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# FEDERAL COMMUNICATIONS COMMISSION REPORTS
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Pages 775 to 892

Reported by the Commission

## FEDERAL COMMUNICATIONS COMMISSION

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# INDEX


| | Page |
|---|---|
| Chronicle Broadcasting Co.; docket No. 18500 (F.C.C. 73-468) | 775 |
| Chronicle Broadcasting Co.; docket No. 18500 (F.C.C. 71D-6) | 839 |

F.C.C. 73-468

BEFORE THE

## FEDERAL COMMUNICATIONS COMMISSION

WASHINGTON, D.C. 20554

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| In Re Applications of<br>CHRONICLE BROADCASTING CO., SAN FRANCISCO, CALIF.<br>For Renewal of Licenses of Stations KRON-FM and KRON-TV, San Francisco, Calif. | Docket No. 18500<br>File No. BRH-926<br>File No. BRCT-94 |

APPEARANCES

*John C. Harrington, Robert L. Heald, James P. Riley, Frank U. Fletcher, Vincent J. Curtis, Jr.* (Fletcher, Heald, Rowell, Kenehan & Hildreth); *Daniel K. Mayers, Dennis M. Flannery, Sally Katzen, Lloyd N. Cutler* (Wilmer, Cutler & Pickering); *James J. Brosnahan* and *Lester W. Spillane* on behalf of Chronicle Broadcasting Co., *Charles Cline Moore* and *Albert H. Kramer* on behalf of Albert Kihn and Blanche Streeter; *John D. Lane* (Hedrick & Lane) on behalf of Rollin Post; *Carl R. Ramey* (McKenna & Wilkinson) on behalf of David M. Sacks; *E. J. Kleines* on behalf of Hearst Corporation and witnesses Randolph Hearst, Charles Gould and Wells B. Smith; *Timothy Fine* for witness William F. Wyman; *Roy Schultz* for witness Arthur Louis Cohen; *Robert Raven* for witness Floyd Sparks; *Leonard L. Leuschner* for witnesses Manuel Larez and Anthony Joseph Salamanca; *Bryan R. McCarthy* for witness Jack Craemer; and *Joseph Stirmer* and *Charles Kelley* on behalf of Chief, Broadcast Bureau, Federal Communications Commission.

DECISION

(Adopted May 3, 1973; Released May 9, 1973)

COMMISSIONER WILEY FOR THE COMMISSION: COMMISSIONER JOHNSON DISSENTING AND ISSUING A STATEMENT.

1. This proceeding involves the applications for renewal of licenses of broadcast stations KRON-FM and KRON-TV, San Francisco, California, filed by Chronicle Broadcasting Co. (hereinafter Chronicle), which is a wholly owned subsidiary of The Chronicle Publishing Co. The latter company also owns the San Francisco Chronicle, one of the two daily newspapers published in San Francisco, and is part owner and publisher of San Francisco's only Sunday newspaper. By *Memorandum Opinion and Order*, FCC 69-262, 16 FCC 2d 882, released March 20, 1969, *reconsideration denied*, FCC 69-1388, 20 FCC 2d 903, released December 22, 1969, we designated the above-captioned applications for hearing.

2. The issues specified for hearing in the designation order,[1] as enlarged by the Review Board (FCC 69R–255, 18 FCC 2d 120 and FCC 69R–337, 19 FCC 2d 240; *application for review denied*, FCC 70–529, 23 FCC 2d 162, released May 26, 1970) are as follows:

1. Whether Chronicle Publishing Company, the parent of the licensee, has an undue concentration of control of the media of mass communications in the San Francisco Bay area;

2. Whether the Chronicle Publishing Company has engaged in anti-competitive or monopolistic practices in the newspaper field in the San Francisco Bay area;

3. Whether the licensee has used the facilities of Stations KRON–FM and KRON–TV to "manage" or slant the news and public affairs for the purpose of advancing the interests of the Chronicle Publishing Company;

4. Whether the past programming of Stations KRON–FM and KRON–TV, particularly with regard to public service programming was of such high quality as to constitute a countervailing factor in the resolution of this case insofar as it relates to Issues (2) and (3), above;

5. (a) To determine the facts and circumstances relating to and surrounding the investigation of Albert Kihn and Blanche Streeter by Chronicle Broadcasting Co.;

(b) To determine whether the conduct of such investigations constituted attempts to harass, coerce and intimidate such persons and, if so, what effect such conduct has upon the qualifications of Chronicle Broadcasting Co. to be a Commission licensee;

6. Whether, in the light of the evidence adduced pursuant to the foregoing issues, a grant of the above-captioned applications would serve the public interest, convenience and necessity.

In addition, inasmuch as the complaints of Albert Kihn and Blanche Streeter (hereinafter Complainants) formed the bases for designating the proceeding for hearing, we named them as parties to the proceeding. With respect to issues 1 and 2, the burden of going forward with the introduction of evidence was placed on Complainant Streeter and the Broadcast Bureau (hereinafter Bureau); with respect to issue 3, the burden of going forward with the introduction of evidence was placed on Complainant Kihn and the Bureau; with respect to issue 4, the burden of proceeding with the introduction of evidence was placed upon Chronicle; with respect to issue 5, the burden of proceeding was placed upon Complainants Kihn and Streeter; and the ultimate burden of proof on all of the issues was placed upon Chronicle.

3. In an Initial Decision, FCC 71D–6, released March 1, 1971, as corrected by Mimeo Nos. 64706 and 64768, released March 2 and March 4, 1971, respectively, Hearing Examiner Chester F. Naumowicz, Jr.,[2] resolved all of the hearing issues in Chronicle's favor and concluded that the public interest would be served by a grant of the renewal applications. Exceptions to the Initial Decision and a brief in support thereof were filed by the Complainants on June 1 and June 3, 1971, respectively. Replies were filed by Chronicle and by the Bureau on July 2, 1971.[3] In addition, Chronicle filed a renewed motion to dis-

[1] The hearing issues were amplified and further explained by a Commission Specification Order (FCC 69–376, 17 FCC 2d 245) released April 23, 1969.

[2] By Order, FCC 72–760, released August 30, 1972, we authorized these officials to change their title from Hearing Examiner to Administrative Law Judge, with the change to be effective September 6, 1972.

[3] Also before us are the following pleadings: (a) statement in support of the Initial Decision filed March 31, 1971, by Chronicle; (b) motion for permission to file pleading in excess of prescribed length filed July 2, 1971, by Chronicle; (c) motion for leave to file reply filed July 14, 1971, by Chronicle; (d) reply to the Bureau's reply filed July 14,

qualify Commissioner Nicholas Johnson on September 21, 1971, and the Complainants filed an opposition thereto on October 18, 1971.

*Renewed Motion to Disqualify Commissioner Johnson*

4. We shall consider first Chronicle's renewed motion to disqualify Commissioner Johnson. In order to place this request in its proper perspective, it is necessary to recount briefly some of the background of this case. On August 18, 1969, Chronicle filed a motion asking that Commissioner Johnson disqualify himself from any further participation in this proceeding or that, if he failed to do so, the Commission conclude that he was disqualified. In urging the disqualification by the Commission, Chronicle alleged, *inter alia*, that Commissioner Johnson had received prohibited *ex parte* presentations from certain interested parties to this proceeding; that he had failed to disclose such matters in a timely fashion; and that he "has created the appearance of providing preferential treatment to individuals, of losing independence of judgment, and of participating in an agency decision outside official channels. . . ."

5. By *Memorandum Opinion and Order*, FCC 69–1131, 20 FCC 2d 33, adopted October 15, 1969, we denied the above motion.[4] In sum, we held that all of Chronicle's allegations treated together, as well as separately, did not support its claim for disqualification. Specifically we held that the receipt of a letter concerning KRON–TV written by Albert Kihn (a former KRON–TV cameraman) on February 7, 1969, after a petition to deny the Chronicle renewal application was filed—but prior to the designation of the application for hearing—was not a violation of the *ex parte* rules and did not constitute any indication of bias. We also held that the indication in the Kihn letter that there had been previous correspondence between himself and the Commissioner raised no further questions of violations of the *ex parte* rules or any improper involvement in the case by the Commissioner. Respecting three letters sent to Commissioner Johnson from a publisher of a San Francisco publication, we held that such letters should have been placed in the Commission's public files since Chronicle's renewal applications had been designated for hearing; that the mere receipt of such correspondence by the Commissioner was not disqualifying; and that the Commissioner's replies thereto did not indicate any improper prejudgment of the case or other lack of impartiality.

6. Finally, we held that certain of Commissioner Johnson's public statements, including a statement on a Public Broadcasting Laboratory (hereinafter PBL) program, concerning the need of the Commission to rely on citizens' complaints, did not indicate bias; that the Commissioner's publicly expressed views on Commission policy, *e.g.*, the concentration of control of media of mass communications, do not

1971, by Chronicle; (e) limited exceptions to the Initial Decision filed June 1, 1971, by Chronicle; (f) petition for leave to amend filed April 28, 1971, by Chronicle; (g) motion to correct transcript and an erratum thereto filed June 21, 1971, and May 26, 1972, respectively, by Chronicle; and (h) petition for leave to amend and the accompanying amendments to the applications for renewal of licenses for broadcast stations KRON–FM and KRON–TV filed October 19, 1972, by Chronicle.

[4] Commissioner Johnson not participating.

indicate a predisposition of this particular case or any other wherein such matters are at issue; that any prior involvement by the Commissioner with certain parties in this proceeding, both prior to and after the KRON applications were designated for hearing, was perfectly proper and consonant with, if not required by, the functions of a Commissioner's office; and that, in view of the foregoing, Chronicle had failed to substantiate its claim that Commissioner Johnson had either prejudged this case or reasonably given the appearance of doing so.

7. In urging us to reconsider our prior rulings respecting the disqualification of Commissioner Johnson, Chronicle has now filed a renewed motion presenting alleged new facts which have recently come to its attention. This alleged new information is as follows: (a) the Commissioner's alleged receipt of further correspondence from Albert Kihn during the period prior to designation of this case for hearing; (b) the alleged funding of counsel for parties in this proceeding from the royalties from one of the Commissioner's books; and (c) the Commissioner's participation in a PBL program in which Albert Kihn also appeared.[5] We shall first set forth the substance of these alleged new matters prior to our consideration of them.

8. *The Kihn-Johnson Correspondence.* Chronicle points out that the February 7, 1969, letter from Albert Kihn to Commissioner Johnson referred to previous letters sent to the Commissioner and to two other letters sent to the Commission concerning KRON–TV. Chronicle also states that Kihn's testimony at the evidentiary hearing indicates that he wrote to the Commissioner in 1967 to tell him about events in the news department of a television station without mentioning the station by name, and that since the February 1969 letter states that Kihn had written to the Commissioner a number of times about KRON–TV, the correspondence between 1967 and 1969 "must have reached a significant volume in order to familiarize Commissioner Johnson with the place of Kihn's employment and the identity of the station. . . ." According to Chronicle, Kihn also testified before the Commission that he had written letters to the Commission, or its members, or staff, subsequent to the letter of December 22, 1968. Moreover, Chronicle also alleges that the Kihn-Johnson correspondence was not one-way because Kihn testified that he received replies to his letters to the Commissioner, although he refused to make them available. Chronicle also states that the Kihn letter of February 1969 indicates that the material he sent to Commission on December 22, 1968, was the same as the material previously sent to Commissioner Johnson; that this same letter also mentions that Kihn is still working on his study of TV; and that the mentioning of these matters for the Commissioner's benefit tends to indicate that there were other letters from Kihn to the Commissioner.

9. *The "Funding" of Complainants' Counsel.* According to Chronicle, the new information that has come to its attention in this respect

[5] In our opinion a majority of this alleged new information was previously raised by Chronicle in its prior motion and thoroughly considered by us in disposing of that request. However, because of the seriousness of the charges again raised and to be sure that no salient fact has been ignored, we have nevertheless considered all of the contentions raised in the instant motion, even though we may have already stated our views with respect to a major part of them.

is a letter to the editor of a magazine written by Mr. Robert Manning of The Atlantic Monthly. Chronicle points out that in this letter it is specifically stated that there is a provision in Commissioner Johnson's contract with the publishers of his book ("How to Talk Back to Your Television Set") that the royalties derived therefrom shall be distributed to an entity or entities devoted to the improvement of American television and that the publishers decided to distribute the first accrued income to the Citizens Communications Center of Washington (hereinafter Center). According to Chronicle, the publishers' decision to select the Center as a recipient of such royalties is readily understandable and is entirely consistent with Commissioner Johnson's oft-spoken and written views that he would subscribe to the publishers' determination that the Center is an organization devoted to the improvement of American television. Moreover, Chronicle also points out that Commissioner Johnson has done nothing since the disclosure of his financial support of the Center in April and May of 1971 to suggest the contrary. Chronicle also points out that the Center has served as counsel to Complainants Kihn and Streeter in this proceeding.

10. *The PBL Appearance.* Chronicle submits that in a PBL program of February 16, 1969, Albert Kihn discussed both his complaints concerning the KRON–TV news operation and his writing to the Commission about them, and that on this same program there was also interspersed a comment by Commissioner Johnson in which he stated that the Commission is "very much dependent upon complaints and statements that are filed by private citizens" since this is the only way such information would come to the Commission's attention. Essentially, it is Chronicle's position that the Commissioner's comments on this PBL program indicate the Commissioner's familiarity with this case and were obviously in reference to this case. In this vein, Chronicle points out that the taped interview with Kihn for the program must have taken place prior to January 6, 1969, since Kihn left the station on that date and since the PBL announcer referred to Kihn as working for KRON–TV at the time his interview was recorded. This being the case and since there is no indication that Commissioner Johnson taped his interview before the Kihn tape, Chronicle asserts it is reasonable to infer "that the Commissioner was aware of the Kihn interview and that he used it as a springboard for his own remarks." Even more significant, says Chronicle, is the fact that Commissioner Johnson had already seen Kihn's first letter of September 8, 1968, thus indicating that the Commissioner's statement on the broadcast may have been "a direct reflection of his interest in the complaint letter of September 8 filed by Kihn." Finally, Chronicle notes that Kihn testified at the hearing that the PBL people told him that they had gotten a copy of his letter and that, based upon this letter, they invited him to appear on their program. Chronicle therefore infers that the Commissioner furnished the Kihn letter to the PBL researchers.[6]

11. Essentially, it is Chronicle's position that the above alleged matters, when considered together, tend to form a picture of at least an ap-

[6] Chronicle also asserts that another reasonable inference is that the Commissioner knew some of his remarks would be interpolated within those of Albert Kihn.

parently improper "involvement" in the case by the Commissioner and also tend to show that he "has become so involved in this matter as to create the appearance of a personal interest." [7] We disagree. All of the matters set forth above together with those alleged by Chronicle in its previous motion which will not be reiterated here, do not warrant the disqualification of Commissioner Johnson. Merely because Chronicle believes that it has now shown that Albert Kihn must have written to Commissioner Johnson a number of times prior to his letter of February 7, 1969,[8] and that the Commissioner responded thereto, adds nothing to what was before us at the time of Chronicle's previous motion; nor would it require us to arrive at a different determination herein. In its previous motion, Chronicle pointed out that Kihn's February 7, 1969, letter to the Commissioner indicated that Kihn had written a number of times about KRON–TV and that "more important, the tone of the letter as a whole contains clear indications that the correspondence was not all one-way." This correspondence, and the Commissioner's failure to release it, was the basis for a claim in the first disqualification motion of apparent partiality, as well as a claim concerning an alleged violation of the *ex parte* rules which is not now renewed. At that time, we rejected the claim of partiality on the grounds that it was perfectly proper for a Commissioner to receive and consider complaints about station operation and that such correspondence need not be placed in a public file. The "newly discovered" facts that Kihn may have begun his correspondence in 1967, that he taped conversations with fellow employees, and that he used these tapes in preparing his letters, add nothing of significance to the material previously considered by us.

12. One further matter with respect to the Kihn-Johnson correspondence warrants brief comment. In again bringing these matters to our attention, Chronicle has indicated that there seems to be a continuing reluctance (apparently on the part of the Commission) to reveal this correspondence. Chronicle has not indicated the basis upon which it arrived at such a supposition, nor can we reasonably surmise any. In our earlier opinion disposing of Chronicle's previous motion, we specifically apprised Chronicle that any complaint letters which may warrant an investigation "will be made available for public inspection under certain conditions upon request when it is determined that no investigation is to be conducted or when the investigation is completed." (20 FCC 2d at 35; see also Section 0.457(g) of the Commission's Rules). The Commission to this date has not received any such

[7] The Chronicle motion also refers to certain peripheral matters which add nothing of significance to its basic point. Thus, it relates that Albert Kihn in June 1967 began to tape conversations with employees and former employees of KRON–TV; that Kihn gave a copy of his complaint letter of September 8, 1968, to Mr. Bruce Brugmann, publisher of the Bay Guardian; that Mr. Brugmann made use of it in an article and also wrote to Commissioner Johnson (this correspondence was considered in our earlier opinion); that in a thesis for a graduate degree the writer (who studied at the school where Mr. Brugmann taught) referred to the Kihn and Streeter complaints and stated: "At least one FCC Commissioner is also interested in the KRON television operation," and that the writer of this thesis relied on the Guardian article for material (this thesis was also previously considered by us in our earlier opinion, see 20 FCC 2d 37, note 6).

[8] Kihn's hearing testimony that he wrote one letter to Commissioner Johnson and that he might have written other letters, when asked if he had any communications with the Commission or any of its members or staff subsequent to his letter of December 22, 1968, is at best ambiguous and does not, in our opinion, establish that there was in fact a further correspondence with the Commissioner.

requests from Chronicle, and we do not agree with Chronicle's supposition that merely because such materials have not been made public by the Commission, they must necessarily contain disqualifying matters.[9] Chronicle on the one hand refrains from making a direct request, and thus deprives the Commission of an opportunity to consider such request on its merits, to see non-public material contained in the Commission's files to support its allegations, and then, on the other hand, relies on the Commission's failure to make such matters public as an indication that the material does in fact contain disqualifying statements. We do not believe that this is a valid approach or that it raises any substantial issue of disqualification.

13. Chronicle's contentions with respect to the disbursement of the royalties from Commissioner Johnson's book similarly present no basis for disqualification. The significant consideration here, we believe, is that the Commissioner turned over to his publishers absolute discretion with respect to the use of the royalties under a standard so broad that it cannot reasonably be suggested that he was indicating any preference for any possible recipient. Moreover, we find no merit to Chronicle's assertion that Commissioner Johnson is in actuality funding the Citizens Communications Center since that organization is one of the recipients of the royalties from his book. He was not consulted on the publisher's decision to make payments to the Center and has given no indication of improper partiality toward that organization. Whether or not the Commissioner believes the award to be a sound one is, in our opinion, an exercise in mere speculation which has no place in the resolution of the serious charges here advanced.

14. Chronicle's remaining alleged new information revolves about the PBL program in which a brief statement by the Commissioner, separately recorded, was interpolated by the producers within a discussion by Albert Kihn.[10] In our opinion, the Commissioner's statement raises no possible issue of bias, and its use with the Kihn interview is similarly of no significance since it was the producers of the PBL program and not the Commissioner who made the interpolation. In any event, the Commission receives many letters of complaint from the public, and as the Commissioner pointed out in his comments, this agency is very much dependent upon such complaints in the proper discharge of its regulatory functions. Moreover, the Commissioner's comments in this respect were most general and expressed no view, directly or by inference, upon the merits of the Kihn complaint. They were instead merely a reiteration of the Commissioner's oft-spoken and well known view that citizens complaints may be of considerable value to the Commission.

15. In view of the foregoing, we shall not attempt to determine whether or not the Commissioner's taped comments were recorded prior to or after Kihn's interview or whether or not the Commissioner's

[9] By letter of May 16, 1969, to the Executive Director of the Commission, Chronicle did request all correspondence received by the Commission concerning KRON–TV after the proceeding became restricted. At no time has Chronicle requested letters going back to 1967.

[10] In our first opinion, we stated that the Commissioner's appearance was "apparently" recorded on a separate occasion and inserted in Mr. Kihn's remarks without the knowledge of the Commissioner. He has confirmed that this was the case.

comments were motivated by and/or in response to Kihn's complaint and statements with respect to KRON–TV. Here again, Chronicle would have us engage in both an exercise of surmise and a probe of the Commissioner's mental processes. Such procedures are totally uncalled for based on the facts before us.

16. In addition to the above, Chronicle also points out that since our decision on its previous motion, the United States Court of Appeals in *Cinderella Career and Finishing Schools, Inc.* v. *Federal Trade Commission*, 425 F. 2d 583 (D.C. Cir. 1970), has specifically delineated the well established test for disqualification and submits that in light of this decision, we "must reconsider and weigh the facts set forth in both this and the previous petition". According to Chronicle, the test of disqualification as stated by the Court in the *Cinderella* case is whether a disinterested observer may conclude that in some measure the facts as well as the law have been adjudged in advance of the hearing. Chronicle also notes that an administrative hearing, as the Court pointed out in the *Cinderella* case, must be attended not only with every element of fairness but with the very appearance of complete fairness. We agree that the *Cinderella* decision reiterates the well-established law for disqualification. Indeed, we decided Chronicle's previous motion under the same standard, stating that the pertinent issue was whether Commissioner Johnson had "formed an opinion prior to decision as to the facts or outcome of this case, closing his mind to persuasion, or has reasonably given the appearance of doing so." (See 20 FCC 2d at 38.) Thus, we find no reason to reconsider our prior determinations with respect to Chronicle's previous motion simply because of the Court's pronouncements in the *Cinderella* case.

17. In sum, all of the facts alleged by Chronicle do not warrant the disqualification of Commissioner Johnson, whether considered alone or together with the facts alleged in Chronicle's previous motion. Indeed, we are convinced that nothing before us suggests that Commissioner Johnson has not remained an impartial member of this Commission. Accordingly, the renewed motion to disqualify Commissioner Johnson will be denied.

### *Hearing Examiner's Initial Decision*

18. In order to place the Complainants' exceptions in proper context, we believe that a brief summary of the Examiner's Initial Decision is necessary. Concerning hearing Issue 1, the concentration of control issue, the Examiner concluded that although the Chronicle interests amount to a powerful voice in the San Francisco area, all segments of Chronicle's media holdings face extensive competition. In this respect, the Examiner found that the record evidence reveals that of Chronicle's total potential audience only about one-half actually listened to any of its broadcasting voices; that only one in ten are exposed exclusively to the Chronicle outlets; and that the combined advertising revenues of both the Chronicle broadcasting stations and the newspaper amount to 7–8% of the total monies devoted to advertising in the area. Moreover, the Examiner concluded that the record fails to establish that Chronicle "even attempts to speak with a single voice . . ." or that

the owners of the Chronicle properties have a greater concentration of media control than exists in numerous other cities.

19. Regarding hearing Issue 2, the anti-competitive practices issue, the Examiner concluded that the record evidence reveals that all of the San Francisco papers sustained losses as a result of the public's nationwide move from the cities to the suburbs during the period 1954–64; that while competing vigorously, Chronicle was the "least unprofitable" of the San Francisco papers and was able to stay in the black only due to the substantial profits generated by KRON–TV; that while substantial sums were spent by both Chronicle and the Examiner (San Francisco's other daily newspaper) for promotional campaigns during this period, both papers continued to lose money; and that the record fails to establish that Chronicle's practices during this period were in any way unusual or unfair, or that the profits from KRON–TV were devoted to financing any improper competitive procedures.

20. With respect to the Chronicle-Examiner joint operating agreement, the Examiner found from the evidence of record that the Hearst Corporation (owner of the Examiner and the News Call Bulletin) initially confronted Mr. Charles deYoung Thieriot (who was then Chairman of the Board of the Chronicle Broadcasting Co. and also President and Director of Chronicle Publishing Co.) with a proposal to enter into a joint operating agreement for the San Francisco papers; that Mr. Thieriot was receptive to such a proposal; that the parties thereafter entered into a joint operating agreement which created the San Francisco Newspaper Printing Company to handle the mechanical, advertising, business and circulation affairs of the San Francisco papers; and that such agreement provided, *inter alia*, that the joint newspaper printing company would pool all of the revenues of the two papers, pay all of the costs of both papers, retain 5% of any excess of its compensation, and distribute any remainder to the two papers in equal shares. In respect to the above, the Examiner concluded that despite whatever antitrust arguments might be made as to the current propriety of the Chronicle-Examiner joint operating agreement, the Newspaper Preservation Act (15 U.S.C. § 1801) refutes these arguments and also establishes the legality of such agreements. However, the Examiner further concluded that this Act does not answer the Commission's public interest questions concerning such joint operating agreements. In this regard, the Examiner noted that prior to entering into the joint-operating agreement, Mr. Thieriot insisted on a "Business Review Letter" [11] from the Department of Justice; that Mr. Thieriot acted responsibly in this respect; and that, consequently, the qualifications of Chronicle to be a Commission licensee are not called into question. The Examiner also concluded that it was not demonstrated on the record that the functioning of the Chronicle-Examiner joint operating agreement had any adverse effect upon the public interest considerations with which

[11] Under certain circumstances the Department of Justice will review a given factual situation and provide a letter stating that it has no present intention of initiating antitrust action under the circumstances in question.

the Commission was concerned when it designated this issue for hearing.

21. With respect to hearing Issue 3, the news management issue, the Examiner concluded that, according to the Commission's specification order (cited *supra*), this issue does not pertain to the fairness or quality of KRON's programming, but rather to whether such programming was governed by self-interest. The Examiner also pointed out that, although to some extent improper motives can be inferred from program content, for the Commission to rely primarily on content would be to act the role of a censor and that, therefore, any "adverse conclusions under this issue are to be reached only if KRON's improper motives have been established by the most clear, convincing and unambiguous evidence." In reaching his decision, the Examiner concluded that such evidence had not been adduced under this issue.

22. With respect to the allegations that the facilities of KRON–TV were used to enhance Chronicle's CATV interests, the Examiner's findings revolved around three incidents: a documentary about the city of Vallejo, California; coverage of the San Carlos, California, "Chicken's Ball"; and coverage of a library dedication in South San Francisco.

23. Concerning the Vallejo incident, the Examiner found that the record evidence reveals that at a "community luncheon" Mr. Harold P. See (then President and Director of Chronicle), at the suggestion of city officials, decided to explore the concept of a KRON–TV documentary on the Vallejo area. Thereafter, See assigned a reporter to the project who wanted to do an exposé type program but was told by See, and the reporter so testified, that an exposé was unsuitable because it might jeopardize Chronicle's CATV interest in the area. In his hearing testimony, See denied having said this is or even discussing the program with the reporter after the latter's return from Vallejo. In evaluating the above testimony, the Examiner concluded that the reporter's recollection was "dim" and that all available evidence, although inconclusive, supported See's version of facts. Thus, the Examiner concluded that a finding adverse to Chronicle was not warranted with respect to this incident, since there was absolutely no evidence of record indicating that CATV considerations motivated KRON–TV's carriage of this program.

24. With respect to the San Carlos "Chicken's Ball," a biennial fund raising project of the area's PTAs and an event which KRON–TV had covered in past years, the Examiner found that the record evidence shows that a postscript to a letter to the mayor of San Carlos regarding a CATV applicant emphasized the connection between KRON and the CATV applicant by mentioning that Mr. See had promised to cover the Ball in color on KRON–TV; that the evidence also shows that See had been appointed as a judge of the skits to be presented at the Ball; that the KRON news director acted as the reporter for the event and also assigned two cameras thereto; that when questioned by the KRON assignment editor and a cameraman about the generous facilities utilized for an event "of marginal interest", the news director "responded that the coverage was relative to the seeking of a CATV franchise in that area"; that on February 18, 1968, a half-

hour program of this event was shown on KRON–TV;[12] and that, shortly thereafter, the San Carlos CATV franchise was awarded to one of Chronicle's competitors. The Examiner concluded that the weight of all the evidence developed in this respect does not warrant a conclusion that the KRON–TV coverage of the San Carlos "Chicken's Ball" was influenced by Chronicle's interest in CATV in that city.

25. Concerning the coverage of the South San Francisco library dedication, the Examiner found that the evidence of record developed in this regard shows that after a conversation between See and the KRON news director, a memo from the news director was sent to the KRON assignment editor which stated that See wanted to pay increased attention to South San Francisco and wanted a library dedication there covered; that when the assignment editor questioned this, the news director explained that See had ordered the coverage because of Chronicle's CATV interests in the area; that in another memo, the KRON news director wrote that "[See] wants to make sure that the mayor of SOUTH SF is prominent in any film we do!"; that, shortly thereafter, the dedication ceremony was covered by KRON–TV, but the bulk of the film was ruined in the lab and the salvaged portion, about 30 seconds' worth, was shown twice; that See wrote a letter to the mayor of South San Francisco explaining the diminished coverage; and that although both See and the KRON news director denied that CATV considerations played a role in the coverage of the dedication, See nevertheless admitted that such considerations may have motivated his explanatory letter to the mayor, since Chronicle's CATV application had emphasized KRON's technical expertise. The Examiner concluded that the coverage of the library dedication, including the customary attention paid to political notables present at the occasion, was routine. Notwithstanding See's instructions to pay particular attention to South San Francisco, the Examiner stated that "there is no strong evidence linking this to the CATV applications."

26. Concerning the statements that were attributed to KRON's middle managers that certain stories should be covered to advance Chronicle's CATV interests, the Examiner found that the "in" joke among KRON's employees at that time was to explain any undesired assignment as a reflection of the company's pursuit of CATV interests. In this vein, the Examiner concluded that there was no evidence that any of these middle managers were ever told by their superiors to base their decisions with respect to KRON–TV programming on Chronicle's CATV interests. Hence, what everybody "knew" turned out to be "wholly lacking in demonstrable factual foundation," the Examiner concluded. The Examiner also concluded that the testimony of See and Thieriot showed them to be "practical and realistic"; that their testimony completely refutes the statements of certain KRON employees concerning the coverage of these events; that there is no evidence of record to cast doubt upon their veracity; and that in

[12] The Examiner found that previous coverage of the Ball consisted of 3 min. 50 sec. (1962), 8 min. 5 sec. (1964), and 4 min. 10 sec. (1966).

weighing all the evidence bearing on this matter, it is not unreasonable to attribute the conflicting testimony to a misunderstanding between a superior and an employee concerning a given assignment.

27. With respect to Chronicle's coverage of labor disputes, the Examiner concluded that they had been "balanced." Although there were disputes between newsmen and supervisors over certain incidents, the Examiner found that the evidence did not indicate that the KRON programming was designed to favor management. Finally, taking all of the incidents bearing on this issue, the Examiner concluded that no pattern emerges, and "no judgment is shown to have been made for the purpose of serving any express or implied policy to slant or bury certain news." Although there were instances of KRON employees' awareness of the effect of their actions on their employer's interest, there was no showing that KRON's management deliberately fostered such awareness or that it actually affected news coverage. The Examiner stated: "While such a climate is undesirable and potentially dangerous, it does not of itself justify a conclusion that KRON did, in fact, slant news to serve its own interest."

28. Concerning Issue 4, the Examiner concluded that it was unnecessary to consider evidence of past programming since such evidence was only to be considered in mitigation of adverse conclusions under Issues 2 and 3, which were resolved favorably to the licensee. However, the Examiner commented that the licensee had made a "sincere and substantial" effort to serve the needs of its audience and, if the conclusions on Issues 2 and 3 were in need of mitigation, KRON's evidence of past programming would be entitled to "not insignificant" weight to that end.

29. Lastly, with respect to Issue 5, the investigative issue, the Examiner found that the evidence establishes that upon learning of Complainants' letters to the Commission, KRON's general counsel advised See to undertake an investigation; that See concurred in this suggestion, and that the general counsel thereafter employed an investigative firm which he considered the "most able and discreet" in the city; that Kihn was placed under surveillance for 28 days during 1968 and 1969;[13] that the investigators conducting this surveillance utilized automobiles to observe Kihn's home and movements, recorded the license plate numbers of persons with whom Kihn came in contact and ascertained their identities through the Motor Vehicle Bureau; that although Kihn was not aware that he was under observation, his neighbors were and had complained twice to the police; and that eventually Kihn discovered that he was being followed and the investigators were instructed to discontinue the surveillance.[14]

30. The Examiner's findings further reveal that after the designation of this proceeding for hearing, KRON's attorneys decided to order a further investigation of Complainants Kihn and Streeter so that information could be developed for cross-examination purposes; that this

[13] Streeter was not placed under surveillance.

[14] Also placed under surveillance was an editor of a San Francisco newspaper after he visited KRON's offices to inspect the station's renewal application. This visit, together with reports that a competing application was about to be filed, aroused KRON's suspicions that there might be connections between Kihn and such an applicant.

subsequent investigation was conducted by the same investigative firm and consisted of interviewing persons who might have knowledge of the Complainants; that the investigators performed the investigation under the guise of conducting a check on both Kihn and Streeter for a potential employer; that more than 50 persons were interviewed; and that ultimately both Kihn and Streeter learned of these interviews. The Examiner's findings also reveal that the investigators employed the technique of undercover contact—that is, becoming friendly with Kihn, his wife, a close friend, and an editor who had looked at the KRON renewal application. The investigation was discontinued following the pre-trial depositions of Complainants. A total of 1,426½ hours was devoted to the case by the investigating firm.

31. The Examiner concluded that neither "the decision to investigate or the conduct of the investigation was unreasonable or malicious, or had the design or effect of chilling citizen complaint to the Commission." With respect to the earlier aspects of the investigation (*i.e.*, surveillance of Kihn), the Examiner found the conduct of the investigators to be discreet and, since the surveillance was discontinued as soon as Kihn discovered it, concluded that it was not intended to harass or discourage Kihn from "pursuing his objective." Similarly, the Examiner concluded that the subsequent aspects of the investigation did not discredit KRON since none of the data obtained was permitted to become public. In conclusion, the Examiner stated that KRON did no more than has been long recognized to be proper for a litigant in an American trial and that the investigation did not constitute an attempt to harass, coerce or intimidate the Complainants or anyone else.

*Complainants' Principal Exceptions to the Initial Decision*

32. *Burden of Proof.* Complainants first claim is that the Examiner erroneously placed the burden of proof upon them. Regarding Issue 3, the news management issue, Complainants allege that the Examiner exhibited a "curious neutrality" in favor of Chronicle when he stated that ". . . adverse conclusions under this issue are to be reached only if KRON's improper motives have been established by the most clear, convincing and unambiguous evidence." Thus, Complainants argue that the Examiner has, in effect, ruled that if the evidence is conflicting (*i.e.*, ambiguous) on an issue, it must be resolved in favor of Chronicle and, accordingly, he has required them to prove their charges beyond a reasonable doubt. Complainants further submit that the parallel between the burden of proof question in this case and that in the second *United Church of Christ* case is "striking". *Office of Communication of the United Church of Christ* v. *Federal Communications Commission*, 425 F. 2d 543 (D.C. Cir. 1969). Complainants also claim that the Examiner's failure to give "probative weight" to the admissions of KRON employees, which related to KRON's programming allegedly designed to enhance Chronicle's CATV interest, simply because he found those employees to be without "actual knowledge" of the truth of those statements, is totally without support in the law.

According to the Complainants: "The general rule of law is that declarations of an employee or agent made during the course and scope of that agency are binding on the principal." Moreover, Complainants state that since the KRON employees did, in fact, present news and public affairs programs in a certain manner because they thought management wanted it that way, Chronicle must be held responsible for its employees' motives. *United Broadcasting Co.*, 23 FCC 2d 493 (1970); *Regal Broadcasting Corp.*, 27 FCC 2d 694, 695 (1971). If those motives cannot be attributed to Chronicle, Complainants urge that Chronicle nevertheless failed to supervise its employees and maintain control of its station and thus failed to operate in the public interest. *The Court House Broadcasting Company*, 21 FCC 2d 792 (1970). Finally, Complainants allege that the Examiner's First Amendment rationale for imposing a higher burden of proof on them on the news management issue simply because the Commission eschews the role of a censor is unpersuasive. According to the Complainants, the alleged management of news programs is in the realm of "commercial" speech rather than "political" or "social" speech and as such is not protected by the First Amendment. Thus, Complainants conclude that they have been deprived of a fair hearing by the Examiner's state of mind toward the burden of proof.

33. *The Joint Operating Agreement, Concentration of Control, and the Newspaper Preservation Act.* Complainants claims that, when entered into, the joint operating agreement between the Hearst Corporation and The Chronicle Publishing Company was illegal as a matter of law, citing *United States* v. *Citizen Publishing Co.*, 394 U.S. 131 (1969). Complainants allege that the anti-competitive controls imposed by the newspapers involved in the *Citizen* case were all present in this case, *i.e.*, price fixing, pooling of profits pursuant to an inflexible ratio, and an agreement not to engage in any other publishing business in a geographical area. Such conduct, Complainants state, is in blatant violation of the antitrust laws, is as anti-competitive as a matter of law as was held to be the situation in the *Citizen* case, and reflects adversely upon Chronicle's character to be a Commission licensee.

34. Complainants also allege that the Examiner erred in failing to apply standard anti-merger law to find that the combination of the Hearst-Chronicle interests in San Francisco constituted an undue concentration of control of the communications media and that Hearst and Chronicle effectuated a horizontal merger within the overall relevant market (*i.e.*, the entire "communications media"). Moreover, Complainants state that the standards established by the Supreme Court in prior horizontal merger cases [15] were violated by the Hearst-Chronicle joint operating agreement and that such agreement also created an undue concentration of control in the communications media as prohibited by Section 7 of the Clayton Act, 15 U.S.C. § 18. In this connection, Complainants contend that the Examiner erred in utilizing

[15] Complainants cite: *Brown Shoe Co.* v. *United States*, 370 U.S. 294 (1962); *United States* v. *Philadelphia National Bank*, 374 U.S. 321 (1963); *United States* v. *Aluminum Co. of America*, 377 U.S. 271 (1964); *United States* v. *Von's Grocery Co.*, 384 U.S. 270 (1966); and *United States* v. *Pabst Brewing Co.*, 384 U.S. 546 (1966).

the entire nine-county San Francisco Bay Area as the relevant geographic market for evaluating the concentration of control issue.

35. Complainants also aver that there is no evidence that the Newspaper Preservation Act is applicable since it has not been demonstrated on the record that any of the San Francisco papers was a "failing newspaper" within the definition of that Act or that the Examiner (San Francisco's other daily newspaper) was unlikely ". . . to become a financially sound publication." In addition, Complainants claim that the Newspaper Preservation Act was not intended to apply to a newspaper which also had other media interests, but was instead intended to broaden the "failing company" doctrine, *i.e.*, to include a newspaper division of a healthy company where the newspaper was in probable danger of financial failure although the company was healthy.

36. *News Management and Slanting.* Complainants allege that the Examiner erred in isolating and evaluating each separate instance of alleged news management and slanting. According to the Complainants, the Examiner obscured and distorted the overall picture in evaluating the record evidence in such a fashion. Furthermore, Complainants aver that the Examiner nowhere analyzed this overall picture. Complainants cite *Miami Broadcasting Corporation*, 19 FCC 2d 651 (Rev. Bd. 1969), wherein the Review Board, disagreeing with the Hearing Examiner's ultimate approach, found that he erred in considering each factual question separately and resolving each in favor of Miami. Quoting from *The Walmac Co.*, 36 FCC 507, 508 (1964), the Board stated: "Isolating and evaluating each of the items in this fashion obscures and distorts the overall picture. Nowhere does the Examiner consider altogether the collective effect of all the * * * information * * * and * * * explanations thereof * * *". The procedure objected to in *Miami*, Complainants argue, is precisely the procedure the Examiner followed here, *i.e.*, taking each item of alleged news management, analyzing it separately, and ruling on each in favor of Chronicle.

37. Complainants also claim that the Examiner failed to consider the overall approach to KRON's programming, which was "making friends in the community." To this end, Complainants submit, that Mr. Harold P. See inaugurated a "community luncheon program" which was intended to create a public service image for the station. Complainants indicate that all of the important people in the community were invited to these luncheons, which were also attended by the "entire upper station management" of KRON; that Mr. See arranged such luncheons so that he could discover the "pet projects" of the community leaders and design broadcasts to satisfy them; and that the sole purpose of these luncheons was to enhance the station's competitive position when it later sought CATV franchises in those communities.[16] Complainants also state that the above community luncheon

[16] Complinants suggest that these public relations efforts took a variety of forms. In Vallejo, Mr. See allegedly followed every program suggestion made by the Mayor at a community luncheon and made a documentary emphasizing the positive aspects of the area, although the writer wanted to tell the "true story" of the political turmoil in the area. In South San Francisco, the day after Chronicle's board of directors had discussed the expenditure of $600,000 for a CATV franchise, Mr. See instructed his news director to broadcast anything newsworthy that came up in that community. In San Carlos, Mr. See ordered the "Chicken's Ball" to be filmed in color because all of the community leaders would be there and because it would enhance KRON's public relations image.

program was instituted by Mr. See at a time contemporaneous with Chronicle's interest in CATV; that a clear pattern thus emerges of a bold, pervasive public relations effort, dedicated and conceived in the early 1960's, to utilize the facilities of KRON–TV to assist in obtaining cable television franchises for the Chronicle interests; and that, as a result thereof, Chronicle has succeeded in becoming the second largest cable television franchise holder in the Grade B contour of KRON–TV.

38. Complainants also allege that when KRON–TV has been called upon to cover a newsworthy labor dispute and where the news story surrounding such an event is related to matters conceivably adverse to the public relations and/or business interests of Chronicle, there has been a clear pattern on the part of the station to provide either non-carriage or late carriage.

39. *The Investigative Issue.* Complainants allege that the Examiner erred in absolving the licensee of any liability for the acts of the investigating firm. Complainants assert that the KRON investigation of them was accompanied by fraudulent conduct, was admittedly done under subterfuge and misrepresentation, and was intended to intrude unreasonably into their private personal lives for the sole purpose of eliciting information which could be used by Chronicle to dissuade the Complainants from further participation in this litigation. Complainants claim that such investigative conduct is illegal under California law.[17] Moreover, in their invasion of privacy cases now pending against the investigating firm, the Complainants emphasize that the California courts have held that they have stated causes of action for invasion of privacy.[18]

40. It is also Complainants' position that Chronicle is clearly responsible for the actions of the investigators, particularly since Chronicle knew that the investigators' improper conduct was taking place, authorized and paid for the investigation and reaped the benefits therefrom. In support of this position, Complainants cite *Van Arsdale* v. *Hollinger*, 68 Cal. App. 2d 245, 66 Cal. Rptr. 20, 437 P. 2d 508 (1968), and state that the California Supreme Court held therein that the exceptions to the general rule of non-liability for the torts of an independent contractor are numerous and that such rule is applied only where no good reason is found for departing from it. In view of the foregoing, Complainants conclude that contrary to the Examiner's determination, the Chronicle investigation of them was clearly a device to harass, coerce and intimidate and is not the type of conduct in which Commission licensees endowed with a public trust should engage.

## CONCLUSIONS

41. The findings and conclusions contained in the Examiner's Initial Decision have been fully reviewed in light of the arguments urged

[17] Complainants cite: California Business and Professions Code §§ 7528(b) and 7551; *Wayne* v. *Bureau of Private Investigators and Adjusters*, 201 Cal. App. 2d 427, 20 Cal. Reptr. 194 (1962); *Taylor* v. *Bureau of Private Investigators and Adjusters*, 128 Cal. App. 2d 219, 275 P. 2d 579 (1954); *Carmona* v. *Keller*, L.A. Superior Court, EAC 5881; and *Carmona* v. *Transport Indemnity*, L.A. Superior Court EAC 6659.

[18] Complainants point out that the trial court in the *Kihn* case expressly followed *Nader* v. *General Motors Corporation*, 25 N.Y. 2d 560, 255 N.E. 2d 765 (1970), in recognizing the tort of unreasonable intrusion into a person's private personal life.

by the parties in the pleadings now before us. In our opinion those findings and conclusions represent a fair and reasonable interpretation of the record evidence compiled in this case and, accordingly, they are adopted except as modified in this Decision and in the rulings on the exceptions as set forth in the Appendix. We shall now consider the Complainants' principal arguments in the same order as they have been set forth.

42. *Burden of Proof.* Complainants' arguments in this respect center primarily around the Examiner's treatment of the record evidence developed under Hearing Issue 3, *i.e.*, whether Chronicle used its broadcast facilities to manage or slant the news and public affairs for the purpose of advancing the interests of its parent company, The Chronicle Publishing Company. In designating this hearing issue, we placed the burden of proceeding with the introduction of evidence on Complainant Kihn and the Broadcast Bureau and the burden of proof on Chronicle.[19] In so allocating the evidentiary burdens (particularly the burden of proof) under this hearing issue and others so designated, we concluded that a departure from the Commission's general practice in this area [20] was justified because of the factual situation of this case, *i.e.*, the principal facts surrounding Chronicle's alleged misconduct were peculiarly within its knowledge since those facts concerned the use of Chronicle's broadcast facilities.[21]

43. We now turn to the specifics of the Complainants' arguments. As heretofore summarized, the Complainants do not question the allocation of the evidentiary burdens among the parties to this proceeding, but they contend that the Examiner in considering some of the record evidence has improperly placed the burden of proof on them rather than on Chronicle. In support of this contention, the Complainants refer to certain statements [22] made by the Examiner in his Initial De-

[19] Section 309(e) of the Communications Act of 1934, as amended (47 USC § 309(e)), sets forth the governing standards for allocating evidentiary burdens in a proceeding such as this one. In pertinent part, that section states:

"The burden of proceeding with the introduction of evidence and the burden of proof shall be upon the applicant, except that with respect to any issue presented by a petition to deny or a petition to enlarge the issues, such burden shall be as determined by the Commission."

As is readily apparent from the above, the Commission's discretionary powers in this respect are broad so that proceedings before it may be conducted in such a manner as will best serve the ends of justice (Section 4(j) of Act, 47 U.S.C. § 4(j)). The above enabling statute is also reflected in Section 1.254 of the Commission's Rules (47 C.F.R. § 1.254).

[20] In *D and E Broadcasting Co.*, 1 FCC 2d 78, 5 RR 2d 475 (1965), the Commission outlined its policy on burden of proof questions and stated, *inter alia*, the following:

"Generally speaking, when hearing issues involving serious misconduct are designated as the result of a petition to deny or a petition to enlarge issues, the burden of proceeding with the evidence and the burden of proof will be placed upon the party making the charges. We recognize that there may be cases in which departure from this general practice may be justified." 5 RR 2d at 478.

[21] *Cf. Elyria-Lorain Broadcasting Co.*, 6 RR 2d 191 (1965), and *Washington Broadcasting Co.*, 3 FCC 2d 777, 7 RR 2d 601 (1966), where the Commission exercised its discretionary powers in a similar manner by placing the burden of proof on the applicants rather than upon the petitioners.

[22] Complainants contend that the following statements clearly show the Examiner's state of mind toward the burden of proof: (a) in paragraph 253 of the Initial Decision, the Examiner stated ". . . adverse conclusions under this issue are to be reached only if KRON's improper motives have been established by the most clear, convincing and unambiguous evidence"; (b) in footnote 35, at page 23 of the Initial Decision, the Examiner stated ". . . Such a showing does not convince the Examiner that the sole or primary cause of the cessation of the business was the increase in advertising rates"; and (c) in paragraph 107 of the Initial Decision where the Examiner considered certain evidence regarding statements by the KRON management employees and where he held that such statements ". . . were received in contemplation of further evidence either that they were based on knowledge or could be presumed to be so based . . . the Examiner now regards them as without probative weight". In the interest of brevity, we have not attempted to list all of the Examiner's statements upon which the Complainants reply. We have, nevertheless, thoroughly considered all such matters in reaching our decision.



109-038—73——2

cision and submit that these statements show a predisposition on the part of the Examiner in his treatment of the evidentiary burdens in this case. The short answer to the above, we believe, is that a few isolated phrases and sentences extracted from the Examiner's total analysis of all of the record evidence developed surrounding a given matter are wholly inadequate to support the serious contentions the Complainants here raise. Certainly, in the absence of something more concrete, we are not prepared to say that such statements, in and of themselves, clearly demonstrate the Examiner's partiality toward Chronicle in his consideration of the record evidence in this case. In any event, we are convinced that in every instance the particular statement relied on by the Complaintants is, in essence, language clearly taken out of context. For instance, Complaintants allege that the Examiner improperly placed the burden of proof on them and also required them to prove their allegations beyond a reasonable doubt when he stated that adverse conclusions under Hearing Issue 3 are to be reached only if KRON's improper motives have been established by the most clear, convincing and unambiguous evidence. However, the Examiner's complete statement in this respect is as follows and does not, in our opinion, suggest what the Complainants contend.

> In its Specification Order released April 23, 1969, the Commission emphasized that this issue did not contemplate a generalized examination of KRON's programming to see if it was fair. Rather the inquiry was initiated 'because of the presence of outside business interests and specific allegations that the preparation of programs has been deliberately made compatible with those interests'. That is to say, the judgment, in this instance, is not of the content of programming *per se*. It is of the motives which underlay the presentation of that programming, specifically whether it was governed by self-interest.
>
> Such motives can, of course, be inferred from program content. However, if program content is the sole or primary evidence relied upon, the Commission would, *in effect*, be placed in the role of a censor imputing improper motivation for programming of which it disapproves. Since the Examiner is aware that the Commission eschews such a role, he believes that adverse conclusions under this issue are to be reached only if KRON's improper motives have been established by the most clear, convincing and unambiguous evidence.
>
> No such evidence has been adduced. To a tiny core of incidents not inconsistent with guilt has been added a welter of rumor, innuendo, suspicion, and office jokes. . . . [The Examiner next proceeds with a lengthy analysis of some of the incidents which illustrate his point.] I.D. para. 252–54.

44. Moreover, what the Complainants fail to point out, and what we have found after our review, is that the Examiner's conclusions under this hearing issue were based not upon Complainants' failure to prove their case "beyond a reasonable doubt," but rather upon the record as a whole and the weight of the evidence. The Examiner found that the record evidence completely refuted or explained the Complainants' *prima facie* showing (see, for example, paragraphs 113 and 128 of the I.D.). No useful purpose would be served by further recounting all of the Examiner's complete statements from which the Complainants have selected portions to support their contentions in this respect (see footnote 22, *supra*). For the purposes of this review, we believe that it is sufficient merely to point out that we have thoroughly reviewed all such matters and find that these phrases and sentences were likewise set forth out of context and that the Examiner's complete statements, from which these quoted matters have been taken,

clearly demonstrate that the Complainants' contentions are without merit.

45. Equally without merit is the Complainants' contention that the Examiner's conduct in this case is similar to the type of conduct exhibited by the Hearing Examiner in the second *United Church of Christ* case, cited *supra*, which the United States Court of Appeals for the District of Columbia Circuit found objectionable. In the *United Church of Christ* case, the Court found that the Examiner, pursuant to the Commission's designation order and contrary to a previous ruling of the Court, improperly placed the ultimate burden of proof on certain issues upon the intervenors rather than the applicant and held that the Examiner, in conducting the evidentiary hearing, demonstrated a "curious-neutrality-in-favor-of-the-licensees." The Court also stated that the Examiner's erroneous concept of the burden of proof prevented the development of a satisfactory record since he consistently confused mere allegation with testimonial evidence, dismissing the latter by characterizing it as the former. Thus, the Court concluded that the administrative conduct reflected in the record was beyond repair, and ordered a new hearing. In the instant case, however, none of the irregularities noted by the Court in the *United Church* case are present. As previously discussed, we believe that the apportionment of the evidentiary burdens among the parties to this proceeding was proper, and indeed, the Complainants have not contended otherwise. Moreover, except for surmise and conjecture, the Complainants have offered no specific examples showing the Examiner's "curious neutrality-in-favor-of-the-licensee" or showing his alleged improper exclusion of relevant testimonial evidence as was shown in the *United Church of Christ* case.

46. Likewise, we find no merit to the Complainants' contention that the Examiner erred in failing to give any probative weight to certain admissions made by the KRON middle managers which related to programming allegedly designed to enhance Chronicle's CATV interests. While we agree with the Complainants that, under certain circumstances, the general rule of Agency Law requires that declarations made by employees and/or agents are binding upon their principals, we do not believe that such a general rule of law is either applicable or governing with respect to the admissibility of evidence. On the contrary, we are persuaded that the appropriate rule in this respect is set forth in 4 Wigmore Section 1078 (3d ed. 1940), which provides, in essence, that the question of the admissibility and weight to be accorded the admissions of employees and/or agents must necessarily turn on the scope of the authority of the speaker. In our opinion, the Examiner, in considering and weighing the admissions made by the KRON middle managers, properly applied this latter test. For instance, he concluded that those particular admissions could not be given any probative weight because it had been clearly shown on the record that they were made not within the scope of the speaker's actual or apparent authority and were not based on actual knowledge. On this matter, the Examiner stated the following:

". . . The individuals to whom [the admissions] were attributed were middle management personnel whose duties were related to the operation of KRON

as a television station, not the business activities of either the station or its owners. If, in fact, KRON programming was being used to advance Chronicle's business interests, it would have been necessary to issue appropriate orders to these people, but it would have been neither necessary nor natural to have informed them of the motives for such orders. Hence, there is no presumption that their statements in this area are based on actual knowledge.

"This is not to say that they could not have possessed such knowledge: only that it must be proven and not presumed. Such proof is totally lacking. . . ." I. D. para. 107–08.

47. We also find no merit in Complainants' additional argument that Chronicle has failed to supervise its employees and maintain control of its stations. Except for bare assertions, the Complainants have offered no evidence to substantiate this claim. Regarding the Complainants' First Amendment arguments, we do not believe that they are applicable to the facts of this case. The "commercial" speech cases relied on by the Complainants (*Valentine* v. *Chrestensen*, 316 U.S. 52 (1942) and *Ginzberg* v. *United States*, 383 U.S. 463, 474 n. 17 (1966)) apply solely to "purely commercial advertising." In the instant case, however, we do not believe that commercial advertising is at issue. Merely because the Complainants attempt to equate certain news and public affairs programs carried by the KRON broadcast stations with commercial advertising does not in our opinion alter the facts of this case. In any event, and as will be shown hereafter, we are convinced that it has not been shown on this record that Chronicle either slanted or managed the news and public affairs programming for commercial profit or for any other self-interest.

48. In sum, we are convinced that the Examiner in conducting the evidentiary hearing in this case has acted properly and within his delegated authority and that the Complainants' contrary contentions are totally without merit.

49. *Joint Operating Agreement, Concentration of Control, and the Newspaper Preservation Act.* As will be shown hereafter, the Newspaper Preservation Act clearly exempts the Chronicle-Hearst joint operating agreement from the provisions of the antitrust laws. Thus, we need not determine, as Complainants' request, the legality of that agreement at the time it was executed simply because the Department of Justice was then actively engaged in court proceedings challenging a joint operating agreement between two daily newspapers in Tucson, Arizona, which was subsequently found to be illegal (*Citizens Publishing Co.*, cited *supra*). Therefore, our only concern in this area is to determine whether Chronicle's conduct at that time was of such a nature as to reflect adversely upon its qualifications to be a Commission licensee. Based on our review, we find that the record evidence clearly demonstrates that the principals of Chronicle acted responsibly in both negotiating and executing the Chronicle-Hearst joint operating agreement; that their conduct does not call into question the qualifications of Chronicle as a corporate licensee; and that the Complainants' contrary contentions are completely without merit. The Examiner's recapitulation of the evidence of record compiled in this respect is adequately set forth in paragraphs 36–41 of the Initial Decision and need not be repeated here.

50. We find Complainants' "horizontal merger" arguments inapposite since no merger or consolidation has taken place between Chronicle and Hearst. Briefly stated, a merger as defined by the courts is the absorption by one corporation of the properties and franchises of another whose stock it has acquired, with the latter corporation ceasing to exist and the former surviving.[23] In a consolidation, an entirely new corporation is created and the consolidating corporations surrender their separate existence.[24] As previously noted, the Chronicle-Hearst agreement essentially provides for the creation of an equally owned corporation to handle the mechanical, advertising, business and circulation affairs of the two San Francisco newspapers. Under the agreement, both newspapers continue to exist as separate corporate entities and neither has acquired the stock of the other. In view of the foregoing, and under the definitions above, we are not persuaded that Chronicle and Hearst have effectuated a merger or consolidation in violation of Section 7 of the Clayton Act, as the Complainants contend.

51. As previously stated, we believe, as did the Examiner, that the Newspaper Preservation Act clearly exempts the Chronicle-Hearst agreement from the provisions of the antitrust laws and prohibits us from taking any action based thereon. Briefly stated, the Newspaper Preservation Act grants immunity from the antitrust laws for any joint operating agreement between competing newspapers where such an agreement was entered into because of the economic distress of all but one of the parties involved. This immunity permits competing newspapers to produce jointly and distribute their papers and, at the same time, eliminates all competition between such papers by permitting the fixing of identical subscription and advertising rates, and the pooling of profits. Section 4 of this Act prevents the Department of Justice or any private party from suing under the antitrust laws, and prohibits any department or *regulatory agency* of the government from "imposing sanctions or taking any other action on the ground that entering into, performing, enforcing or renewing such a joint operating arrangement violates or is inconsistent with the antitrust laws or is contrary to the public interest." S. Rep. No. 91–535, 91st Cong., 1st Sess. 5 (1969). Particularly germane to the matters now before us is a limited exception *also* set forth in Section 4 of the Act, which specifically states that joint operating agreements entered into prior to the effective date of the Act are retroactively granted immunity from the antitrust laws. H.R. Rep. No. 91–1193, 91st Cong., 2nd Sess. 3, 5 (1970). Though entered into prior to the Newspaper Preservation Act, it is readily apparent from the above that the Chronicle-Hearst joint operating agreement is specifically exempt from the antitrust laws, and thus we find no merit to the Complainants' contrary contentions.

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[23] *Fisher* v. *Commissioner of Internal Revenue*, 108 F. 2d 707, 709 (6th Cir. 1939), *cert. denied*, 310 U.S. 627 (1940); *Ahles Realty Corporation* v. *Commissioner of Internal Revenue*, 71 F. 2d 150, 151 (2d Cir. 1934), *cert. denied*, 393 U.S. 611 (1934); and *Commissioner of Internal Revenue* v. *Dana*, 103 F. 2d 359, 361 (3d Cir. 1939).

[24] *Metropolitan Edison Co.* v. *Commissioner of Internal Revenue*, 98 F. 2d 807, 810 (3d Cir. 1938), *aff'd*, 306 U.S. 522 (1939).

52. We now turn to Complainants' arguments relating to concentration of control via commonly owned newspaper-broadcast combinations in the same market. In *Midwest Radio-Television, Inc.*, 24 FCC 2d 625 (1970), when presented with the question of whether to rule on this particular matter on an *ad hoc* basis, we decided that it would not be in the public interest to examine newspaper-broadcast joint ownerships in the context of that renewal proceeding, but that such matters could be more appropriately dealt with in general rulemaking proceedings.[25] Similarly, in *Michiana Telecasting Corp., et al.*, 26 FCC 2d 21 (1970), we stated that questions of general cross ownership policy relating to the structure of the broadcasting and CATV industries, absent clear and substantial evidence of abuse or extreme concentration, are more appropriately resolved in rulemaking proceedings, rather than on an *ad hoc* basis. See also *Chuck Stone* v. *FCC*, 24 RR 2d 2105, 2122–24 (D.C. Cir. 1972), *rehearing denied* 25 RR 2d 2001.

53. Given the above, we believe that the question now presented is whether there is "substantial evidence of abuse or extreme concentration" by Chronicle in the San Francisco market which would warrant a departure from our general rule. We think not. As the Hearing Examiner has found, the San Francisco area is served by a plethora of media. At least 7 other TV stations serve the area covered by KRON–TV's Grade A contour; at least 21 AM primary services daytime and 3 such services nighttime are available throughout the KRON–TV Grade B contour; at least 30 FM stations serve parts of the "Bay Area." Also, the "Bay Area" is served by 29 daily newspapers of general circulation, only two of which are published in San Francisco itself. Of the others, at least 8 are widely read in the area. In addition, numerous other publications are available in the area, including at least 34 national magazines. Thus, we can find no evidence of abuse or extreme concentration and believe that there is no basis for *ad hoc* action in this particular case. See also *Federation of Citizens Associations of the District of Columbia, et al.*, 21 FCC 2d 12, 14 (1969).

54. Finally, we find Complainants' relevant geographic market arguments to be without merit. The short answer to all of the Complainants' contentions in this respect is that the criteria utilized by the Courts in determining whether a particular newspaper has an undue concentration of control of the printed press are neither appropriate nor applicable for determining undue concentration of control in the broadcasting industry. Stated more specifically, even though it may be determined that the San Francisco printed press enjoys a five county newspaper market, this does not mean that such an area is the relevant market for all of the broadcast stations located in that city or, more particularly, KRON–TV's relevant market. On the contrary, we agree with the Examiner that the nine county San Francisco Bay Area properly depicts the relevant market of KRON–TV. Such an area roughly approximates the station's Grade B contour

[25] See Docket No. 18110, *Further Notice of Proposed Rulemaking*, 22 FCC 2d 339 (1970), where we have proposed rules aimed at reducing common ownership, operation or control of daily newspapers and broadcasting stations within the same market.

and, more importantly, is the area served by that station. The Commission has traditionally utilized a station's service area in determining the relevant geographic market of a broadcast station.[26]

55. Moreover, in Docket No. 18110, 22 FCC 2d 339, 349 (1970), we specifically indicated that the Commission would continue to apply the criteria set forth in the duopoly rules (Sections 73.35, 73.240 and 73.636) in resolving undue concentration of control issues. However, we recognized in that proceeding that newspapers do not have service contours and, therefore, a difficult problem is presented when their areas of concentration are compared with those of broadcast stations. Accordingly, we invited comment on how newspaper markets should be defined for purposes of measuring undue concentration of control. In view of the foregoing, and in the absence of an overriding public interest showing which would require us to hold otherwise, we are convinced that such matters here raised by the Complainants are more appropriately dealt with in the context of rulemaking proceedings rather than on an *ad hoc* basis in an adjudicatory proceeding.

56. *News Management and Slanting.* We find no merit to the Complainants' contention that the Examiner's consideration of all of the record evidence bearing on this hearing issue was unduly restrictive. Based on our review of the record *vis-a-vis* the Initial Decision, we find that the Examiner had indeed analyzed the evidence of record in precisely the manner that the Complainants claim he did not, i.e., after considering each alleged instance of improper news management, and concluding that individually none was based on Chronicle's self-interest, the Examiner then proceeded to consider and analyze the collective effect of all of the evidence compiled in this respect. For instance, see paragraphs 252–258 of the Initial Decision and, more particularly, paragraphs 259–260 where the Examiner specifically stated the following:

". . . There remains to be considered whether, viewed as a whole, [the incidents relating to the charge of news management] show a consistent course of action from which such policy or practice [of improperly promoting the station's own interests] can be reasonably inferred. The Examiner does not conclude this to be the case.

"No pattern emerges. Each incident is shown to have been judged on its own facts and the decisions relating thereto made on the basis of those special facts. In retrospect, not every judgment was perfect, but no judgment is shown to have been made for the purpose of serving any express or implied policy to slant or bury certain news. This is not to say that KRON employees were unaware of the impact their actions might have on their employer's interests . . . However, it is not shown that this awareness actually affected the coverage of any news story or that it was deliberately fostered by KRON's management . . . While such a climate is undesirable and potentially dangerous, it does not of itself justify a conclusion that KRON did, in fact, slant news to serve its own interest."

57. We likewise cannot accept the contention that the Examiner erred in failing to consider or weigh properly certain evidence surrounding a "community luncheon program" which was sponsored by Chronicle and which the Complainants believe was part of a bold, pervasive public relations effort instituted by Chronicle for enhancing its

[26] See Sections 73.35(b), 73.240(a)(2) and 73.636(a)(2) of the Commission's Rules; see also *Lee Enterprises, Inc.*, 18 FCC 2d 684 (1969); *cf. Massachusetts Bay Telecasters* v. *FCC*, 261 F. 2d 55 (1968).

position in acquiring CATV franchises. Indeed, what we have found after our review is that the Complainants' arguments in this respect are based solely upon misstatements of the evidence and also either ignore or mischaracterize the Examiner's proper analysis of all of the evidence surrounding this matter.

58. While it is true that the record does contain some evidence from which it might be inferred that the Chronicle community luncheon program was utilized solely for the purposes the Complainants suggest,[27] we are persuaded, as was the Examiner, that a preponderance of the record evidence bearing on this matter clearly dispels any doubts in this regard and indeed refutes the Complainants' interpretation of these community luncheons. For instance, the record reveals and the Examiner found (paragraphs 76–96 of the Initial Decision) that the community luncheon program was one of a series of public relations efforts originated by Chronicle in 1961 as a means of determining community needs and interests; that, since its inception, a total of 72 luncheons in 17 communities in the KRON–TV service area have been held, with attendance ranging from 27 to 60 persons; and that the location and guest list of such luncheons is determined by KRON's Public Affairs Director, who had neither responsibility for nor authority to pursue Chronicle's CATV interests.

59. The record likewise reveals that Chronicle's interest in CATV did not manifest itself until 1965, some four years after the luncheon program was instituted, and that the principals of Chronicle (particularly Mr. Harold See) who were charged with pursuing Chronicle's CATV interests had no role in the selection of either the location or the guest list of these community luncheons, except to issue general instructions that the luncheons be rotated throughout the area and the guest list be representative of the surrounding area where the luncheon was to be held. We further note that, since the inception of the luncheon program in 1961 and prior to 1965 when Chronicle expressed an interest in obtaining a CATV franchise in Vallejo, California, a total of five luncheons had been held in that community; that the determination to hold the 1966 Vallejo luncheon, which was contemporaneous in time with Chronicle's efforts to obtain a CATV franchise for that community, and the selection of the guests to be invited were made by the KRON Public Affairs Director rather than by any of the principals of Chronicle who were then actually pursuing Chronicle's Vallejo CATV interests; and that the testimony of some of the persons attending this 1966 Vallejo luncheon indicates that Chronicle's CATV interests were not discussed at this particular luncheon, nor were they brought up in the discussions centering around the KRON–TV documentary program for the Vallejo area.

[27] The record reveals and the Examiner found that in early 1965 Chronicle manifested an interest in acquiring a CATV franchise in Vallejo, California (footnote 45 of the I.D.); that Chronicle sponsored a luncheon in Vallejo on March 16, 1966, which was attended by some of the Chronicle officials and the community leaders who had earlier discussed Chronicle's CATV interests in the area; that at the luncheon these same Chronicle officials and community leaders also discussed the possibility of a KRON–TV documentary program for the North Bay area of San Francisco, California, which would relate, in part, to the city of Vallejo (paragraph 79 of the I.D.); and that shortly thereafter, KRON–TV did in fact carry such a documentary program which was titled "Where the Bay Begins" and of which 38% of the program was related to Vallejo (paragraph 89 of the I.D.).

60. Based on the above and other countervailing evidence of similar nature, which we have not recounted but which is specifically pointed out in our rulings on Complainants' exceptions as contained in the attached Appendix, the Examiner concluded, and we agree, that Chronicle's public relations efforts were not conceived and dedicated solely or primarily for enhancing its CATV interests or for any other self-interest, as the Complainants suggest.

61. As previously stated, the Complainants also contend that it has been clearly shown on the record of this proceeding, and the Examiner has failed to so find or conclude, that certain KRON–TV programming (the documentary program about the city of Vallejo, as noted above; a program covering the San Carlos, California, "Chicken's Ball", a fund raising project by the San Carlos, California, area's PTAs; a program covering the South San Francisco library dedication; and KRON–TV coverage of certain local labor disputes) was likewise motivated by Chronicle's CATV and other self-interests. We disagree. What we have found after our review is that the Complainants' contentions respecting these matters are grounded upon distortions and/or misrepresentations of the record evidence; upon selected circumstantial evidence which is clearly outweighed by a preponderance of all of the other evidence; upon hearsay testimony which the Examiner properly rejected; and finally upon numerous mischaracterizations of the Examiner's analysis of the evidence surrounding these matters of record. In order for us to answer individually all of the Complainants' contentions it would be necessary to recount all of the evidence compiled on the record bearing on this hearing issue. No useful purpose would be served by such a procedure since the Examiner's findings in this respect (paragraphs 67–134 of the I.D.) represent, in our opinion, a fair and reasonable recapitulation of the evidence surrounding the alleged management and/or slanting of the KRON programming, as the Complainants have charged. Thus, for the purpose of this review and in view of our detailed analysis of each of the Complainants' assertion surrounding this portion of the record set forth in our rulings on the exceptions in the attached Appendix, we believe that it is sufficient merely to point out that we have thoroughly reviewed the record evidence *vis-a-vis* the Initial Decision in light of the arguments urged by the Complainants. Based on such a review, we conclude that the Examiner's findings of fact relating to these matters are completely supported by the record evidence and that his conclusions are a fair and reasoned interpretation of those findings.

62. *The Investigative Issue.* A brief analysis of this particular hearing issue is necessary so that the Complainants' arguments may be considered in their proper perspective. In adding this issue the Review Board stated, and we agree, that by voluntarily placing themselves in an adversarial posture the Complainants exposed themselves to a reasonable and proper search of their credentials; that while such an investigation is permissible in a litigative context, this is not to say that the Complainants have consented to an exposure of their entire background and living habits; and that the manner in which the investigation was conducted, its scope, and the purpose for which it was instituted are all factors to be considered in determining whether it

was proper and permissible.[28] With this background, we now turn to the specifics of the Complainants' arguments bearing on this hearing issue.

63. As previously stated, the Complainants' contend that the Examiner erred in absolving Chronicle of any liability, presumably adverse conclusions resulting in disqualification, respecting the investigations of them, because such investigations were clearly illegal under California state law since they were accompanied by fraudulent investigative conduct, were admittedly done under subterfuge and misrepresentation, and were intended to intrude unreasonably into Complainants' private lives. The short answer to this contention is that California state law and the court's interpretation thereof are neither applicable nor governing under the hearing issues of this proceeding, *i.e.*, whether or not the conduct of the KRON investigation of the Complainants constituted attempts to harass, coerce and intimidate and, if so, what effect such conduct has upon the qualifications of Chronicle to be a Commission licensee.

64. Irrespective of the foregoing, and in light of the Complainants' general contention reflected throughout their exceptions (*i.e.*, the Examiner erred in considering and weighing the record evidence in this proceeding), we have on our own motion nevertheless reviewed the evidence bearing on this hearing issue *vis-a-vis* the Initial Decision to be certain that the Examiner's findings of fact are supported by and reflective of the record evidence and to be certain further that his conclusions also represent a fair and reasonable analysis of those findings. Based on our review, we are in full accord with the Examiner's ultimate conclusions that it has not been demonstrated that the KRON investigations were either intended to or did in fact constitute attempts to harass, coerce or intimidate the Complainants; and that, consequently, Chronicle's qualifications to remain a Commission licensee are not called into question as a result of these investigations. See discussion, paragraph 66, *infra*.

65. While we are convinced that the conduct of Chronicle was reasonable and prudent in undertaking these investigations of the Complainants,[29] we have nevertheless noted some disturbing aspects of those investigations during our review of this portion of the record. Specifically, we note that some of the investigators in conducting their interviews under subterfuge sought information which does not appear in keeping with the purpose and objectives of the investigations[30] and which the Review Board specifically pointed out should be avoided in defining the permissible scope of an investigation when it

[28] 19 FCC 2d 240, 244–45 (1969).

[29] The record reveals, and the Examiner found, that these investigations were commissioned on the recommendation of Chronicle's legal counsel; that Chronicle relied totally on the advice of its counsel, who were not without experience, in recommending and selecting an able investigative firm of excellent reputation to conduct these investigations; and that authorities of unquestionable competence on the subject of proper investigative techniques testified at the hearing that the objectives and methods of these investigations were both conventional and legitimate. See paragraphs 214–235 of the I.D.

[30] Chronicle has maintained throughout this proceeding that the purposes of its investigation were to determine the backgrounds of Kihn and Streeter, to determine what their motives were in filing their complaints against the KRON renewal applications, and to determine who was behind, acting in concert with, or responsible for their respective actions. (Tr. 6516, 6520, 6848, 6859, 7256 and 7269.)

added this hearing issue.[31] For instance, the record reveals that the investigators sought information as to the Complainants' personal social lives (Tr. 6541–43, 6648), past marital history (Tr. 6730–32) and whether or not the Complainants had ever indulged in the use of drugs (Tr. 6707).

66. Whether or not the above was a result of ineptitude on the part of some of the investigators or was brought about because of an absence of specific instructions to these individuals need not be determined in the context of this proceeding,[32] since we have already concluded that Chronicle acted reasonably and prudently in commissioning these investigations and that the Complainants were not in fact harassed, coerced or intimidated so as to discourage their active participation in this proceeding. This is not to say, however, that we are not concerned about the type of investigative conduct here noted or that we intend to condone all future litigative investigations utilizing such procedures. Indeed, the danger of sanctioning such investigations, we believe, is readily apparent since it would clearly discourage members of the public, more timid than the Complainants in this proceeding, from bringing matters to the Commission's attention which fall within its regulatory powers and would also dampen the active participation of interested parties in Commission adjudicatory proceedings. We thus hold that the licensee will be held strictly accountable for all such investigations; that it is therefore incumbent upon the licensee not only to choose responsible investigators but to impress upon them the need to adhere closely to legitimate means and purposes in the investigation; and that the investigators' failure in these respects will reflect adversely upon the licensee, and in a particularly flagrant case can even be disqualifying. Thus, we wish to make it clear that, even though an investigation is not intended for the purpose of harassment, coercion, or intimidation, this Commission will nevertheless continue to examine thoroughly any investigation of parties participating in adjudicatory proceedings before this Agency. When it is found that the scope, breadth, and techniques employed in such investigations are improper in the context of a particular proceeding, the party instituting this type of investigation will be held responsible and, where appropriate, adverse conclusions will be drawn. In this case, the matter is one of first impression, and KRON–TV proceeded reasonably in choosing a responsible investigating organization under our new guidelines, it should have also impressed upon the investigators specifically rather than generally, the need to adhere to legitimate means and purposes in the investigation (see footnote 30). We hold that in these circumstances, what occurred reflects adversely on KRON–TV, but is certainly not disqualifying. Since all licenses are now put on notice as to what is expected of them, and that we do not mean to tem-

[31] As previously mentioned (paragraph 62 *supra*), the Review Board stated that by voluntarily placing themselves in an adversarial posture the Complainants exposed themselves to a reasonable and proper search of their credentials, but this is not to say that the Complainants consented to an exposure of their entire backgrounds and living habits.

[32] These matters are more appropriately directed to the Complainants' contentions of whether or not Chronicle is liable for the acts of the investigative firm under California state law involving action for the invasion of privacy, which we understand is presently before the state courts.

porize in this area, we expect strict future compliance, with the warning that the adverse finding may be heightened in light of an improper occurrence after issuance of the guidance here given.

67. Accordingly, IT IS ORDERED, That the renewal of motion for disqualification of Commissioner Johnson filed September 21, 1971, by Chronicle Broadcasting Co., IS DENIED.

68. IT IS FURTHER ORDERED:

(a) That the petition for leave to amend filed April 28, 1971, by Chronicle Broadcasting Co., IS GRANTED, and the amendment associated therewith, IS ACCEPTED;

(b) That the motion for permission to file pleading in excess of prescribed length filed July 2, 1971, by Chronicle Broadcasting Co., IS GRANTED, and the brief in reply to Complainants' exceptions associated therewith IS ACCEPTED;

(c) That the motion for leave to file reply to Broadcast Bureau's reply to exceptions, filed July 14, 1971, by Chronicle Broadcasting Co., IS GRANTED, and the reply associated therewith, IS ACCEPTED;

(d) That the motion to correct transcript filed June 21, 1971, by Chronicle Broadcasting Co., as amended by an erratum filed May 26, 1972, also by Chronicle Broadcasting Co., IS GRANTED;

(e) That the petition to amend filed October 19, 1972, by Chronicle Broadcasting Co., IS GRANTED, and the amendment associated therewith, IS ACCEPTED; and

(f) That the above-captioned applications (File Nos. BRH–926 and BRCT–94) of Chronicle Broadcasting Co., for renewal of licenses of Stations KRON–FM and KRON–TV, San Francisco, California, ARE GRANTED.

69. IT IS FURTHER ORDERED, That this proceeding IS TERMINATED.

FEDERAL COMMUNICATIONS COMMISSION,
BEN F. WAPLE, *Secretary.*

APPENDIX

*Rulings on Exceptions of Complainants Albert Kihn and Blanche Streeter to the Initial Decision*

| *Exception No.* | *Ruling* |
|---|---|
| 1 (1st para., 1st sent.), 1 (2d para.), 38. | *Denied.* By commonly accepted definition, the San Francisco "Bay Area" is comprised of the nine counties bordering on the Bay. Since these nine counties comprise the area of the Chronicle's primary circulation, the area of active competition between the Chronicle and other Bay Area newspapers, the area of territorial exclusivity commonly granted the Chronicle in its contracts for syndicated materials, and since the area roughly approximates the Grade B contour of KRON–TV, the Hearing Examiner, in making the comparisons of newspaper circulations, properly chose the entire nine county area as the relevant market. |

| *Exception No.* | *Ruling* |
|---|---|
| 1 (1st para., 2d sent.), 17 (p. 6), 30 (p. 10), 34, 35 (*re* KRON–TV), 48 (1st sent.), 51, 52, 71 (p. 21), 145, 160, 164, 168, 194, 195 (2d & 3d sent.), 221, 269, 271, 280, 281, 289, 293–295, 323, 336, 354 (1st para.), 362, 363 (1st sent.), 364. | *Denied.* The Examiner's findings are adequately supported by the record evidence and represent a fair and reasonable interpretation thereof. |
| 2 | *Denied.* The requested finding would provide only a partial picture of the actual situation and is thus contrary to the weight of the evidence. See KRON Ex. No. 154, App. A. |
| 3–5, 7, 8 | *Denied.* The requested findings assume that the relevant market is a five county area, whereas the Examiner has properly found the relevant market to be a nine county area. See the ruling on exception No. 1, above. |
| 6 | *Denied.* The requested finding is of no decisional significance. Moreover, "California Living" is a supplement to the Sunday Examiner and Chronicle newspaper and is not a separate magazine in the usual sense. |
| 9 | *Denied.* Complainants' contention that the survey was based on hearsay and should thus be given no evidentiary weight does not represent the applicable law. *Cf.*, for instance *In Re Crown Zellerbach Corporation*, 51 FTC 1105 (1955); *United States* v. *88 Cases, Etc., Bireley's Orange Beverage*, 187 F. 2d 967 (3d Cir. 1951) *cert. denied*, 342 U.S. 861 (1951). Moreover, the Complainants were afforded ample opportunity to submit rebuttal evidence and to conduct such cross-examination as they believed necessary to show that the survey was either improper or unrepresentative as is contended. Furthermore, the underlying documents upon which the survey was based were always available to the Complainants and were not withheld from them. The Examiner's findings and conclusions were correct and are supported by law. *Wirtz* v. *Baldor Electric Co.*, 337 F. 2d 518 (D.C. Cir. 1963). |
| 10, 22, 25, 26–29 (pp. 9–10), 29–33 (pp. 11–12), 44 (p. 16), 46 (p. 16, 1st sent.), 68 (p. 21), 92, 96, 100, 108, 110, 156, 170, 176, 184, 188, 192, 212, 252, 262, 266, 278, 290, 297, 314, 316, 383, 515, 522, 533, 534. | *Denied.* The requested findings are of no decisional significance. |
| 11, 50, 77, 79, 81, 105, 158, 175, 179, 181, 182, 223, 224, 237, 254–256, 261, 332. | *Denied.* The Examiner's findings are adequately supported by the record evidence and represent a fair and reasonable interpretation thereof. Further Complainants' requested findings are of no decisional significance. Also, the Examiner is not required to make findings on every conceivable point on which evidence is offered. |

| *Exception No.* | *Ruling* |
|---|---|
| 12 | *Denied.* The Examiner has found that Western TV Cable does not propose to activate its San Francisco franchise (I. D. para. 9). Thus, the requested finding is of no decisional significance. |
| 13–16 (pp. 4–5), 16 (p. 6), 24, 49, 67 (pp. 20–21), 66 (p. 22), 72 (p. 24), 78, 91, 98, 99, 157, 161, 163, 189, 210, 227, 238, 240, 274 (1st para.), 298, 350–352, 353 (1st sent.), 462. | *Denied.* The Examiner's findings on these matters of record are, for all intents and purposes, similar to those requested by the Complainants. The additional details outlined in Complainants' exceptions would add nothing of substance to the Examiner's findings and are therefore of no decisional significance. |
| 17 (p. 5) | *Denied.* We find nothing unusual or illegal in the Chronicle trade agreement to which the Complainants' refer, and thus the requested findings in this respect would be decisionally insignificant. The requested finding as to money spent by the San Francisco Chronicle for advertising in other media owned or controlled by Chronicle is contrary to the record and the exhibit cited (see B. B. Ex. No. 4, p. 5). |
| 15 (p. 6), 18, 35 (*re.* newspaper), 36, 37, 45 (p. 15), 146–151, 206, 207, 209, 242–250, 253, 257–260, 263, 268, 270, 274 (2d para.), 299–303, 310–313, 327, 344–346, 349, 353 (2d & 3d sents.), 503, 504. | *Denied.* The Complainants' exceptions clearly violate Section 1.277(a) of the Commission's Rules in that they are argumentative and/or unsupported by record citations. |
| 19, 74 (p. 24), 272, 337, 356. | *Denied.* Section 1.277(a) of the Commission's Rules provides that each exception to an initial decision shall contain specific references to the page(s) of the transcript of hearing, exhibit, or order on which the exception is based. Complainants' exceptions contain no such citations. In addition, the requested findings are of no decisional significance. |
| 20, 21 | *Denied.* These exhibits were given proper weight by the Examiner. The exhibits were prepared by an expert on the basis of the best information and techniques available. The originally prepared exhibit was revised in accordance with suggestions by the Complainants and the Bureau (Tr. 4493–4508, 4602–13). Further, the Examiner categorized his findings as estimates and properly treated them as such (I.D. fn. 17). |
| 23, 55, 56, 69 (p. 21), 70 (p. 21), 82, 83, 112–116, 153, 154, 198, 203, 319, 320, 365, 366 (2d-5th and 7th sents.) | *Denied.* The Examiner's findings are adequately supported by the record evidence and represent a fair and reasonable interpretation thereof. Further, Complainants' exceptions are unsupported by a citation to the record as required by Section 1.277 (a) of the Commission's Rules. |
| 39 | *Denied.* Complainants' assumption is not supported by the record. Further, the exception is not supported by a citation to the record as required by Section 1.277(a) of the Commission's Rules. |
| 40 | *Denied.* The requested finding is not supported by the record. B. B. Ex. No. 39 refers only to the advertising revenue of the San Francisco Chronicle. |
| 41 (pp. 13–14) | *Denied.* The requested finding is contrary to the evidence of record (see the stipulation of the parties at Tr. 5397). |

| *Exception No.* | *Ruling* |
|---|---|
| 41 (p. 14) | *Denied.* The Examiner's finding is not based upon KRON Ex. No. 183 but rather upon testimony elicited by counsel for Complainants and the Broadcast Bureau concerning the Hearst losses (Tr. 5049, 5070). The "actual figures" cited by Complainants in their exception are irrelevant since the exhibit upon which they are based has not been admitted into evidence. The Hearing Examiner properly precluded testimony relating to the effects of a modern plant on Hearst's operations, since such matters relate solely to the San Francisco Examiner and are therefore irrelevant to this proceeding. The last sentence of Complainants' exception is speculative, argumentative and is not based on the evidence of record. |
| 42 | *Denied.* The Examiner's finding is supported by the evidence (Tr. 5111–12, 5179 (2d page so numbered), 5258–59). |
| 43 (p. 15), 47, 66 (p. 20) | *Denied.* The Examiner's finding concerning the "basic thrust" of Chronicle's campaign is supported by the evidence (Tr. 5132–33, 5180–81). Complainants' assertion relating to accumulated surplus is of no decisional significance. The Examiner's finding that the profits generated by Chronicle's broadcast interests were used to support its newspaper interests is supported by the evidence. In addition, these exceptions are not supported by citations to the record as required by Section 1.277(a) of the Commission's Rules. |
| 44 (p. 15) | *Denied.* The Examiner's finding reflects the census data determined and published by an agency of the United States government and is a proper subject for judicial notice. Complainants do not allege that they were denied "an opportunity to show the contrary" as permitted by Section 7(d) of the Administrative Procedure Act. *Alkima Broadcasting Co.*, 21 R.R. 742a, 742c (1961). |
| 46 (pp. 15–16) | *Denied.* The record reflects that the sale of the San Francisco Examiner was not an available alternative (Tr. 6310), and the Complainants cite no evidence to the contrary. The Hearing Examiner's evidentiary ruling was correct for the reason he stated (Tr. 4796). |
| 43 (p. 16) | *Denied.* The requested finding is of no decisional significance. The fact remains that Chronicle voluntarily requested a Business Review Letter and the Civil Investigative Demand was issued thereafter. |
| 45 (p. 16, 1st sent.), 58–62, 64 (p. 20). | *Denied.* The Hearing Examiner found that although Mr. Thieriot "was not privy to the Examiner's financial records, . . ." he knew that it was losing money (I.D. para. 37). This finding is supported by the record (Tr. 4845–46, 4848–49). That neither Mr. Thieriot nor any other executive of Chronicle knew exactly how much money the Examiner was losing is not of decisional significance since the record shows that Mr. Thieriot knew that the major question before the Department of Justice was the financial condition of the Hearst newspapers (Tr. 5259). In addition, Exception Nos. 60–62 are not supported by citations to the record as required by Section 1.277(a) of the Commission's Rules. |

| *Exception No.* | *Ruling* |
|---|---|
| 45 (p. 16, 2d sent.) | *Denied.* The requested finding is irrelevant to this proceeding since it relates solely to the Hearst newspapers. |
| 46 (p. 16, 2d sent.), 72 (p. 21). | *Denied.* See paras. 49–52 of our decision herein. |
| 48 (2d sent.) | *Denied.* Complainants' exception is contrary to the evidence. The record indicates that Mr. Thieriot's primary motives were the survival of the Chronicle newspaper and the maintenance of two editorial voices in San Francisco (Tr. 4863, 4866, 5258–59). In addition, this exception is not supported by a citation to the record as required by Section 1.277(a) of the Commission's Rules. |
| 53, 54 | *Denied.* The requested findings are of no decisional significance in light of the Newspaper Preservation Act, 15 U.S.C. 1801. In addition, Complainants' exceptions are not supported by a citation to the record as required by Section 1.277(a) of the Commission's Rules. |
| 57 | *Denied.* The requested finding is contrary to the evidence and is not supported by Complainants' citation to the record. |
| 63 | *Denied.* The requested finding is contrary to the evidence (Tr. 6268–72, 6308–09) and is not supported by a citation to the record as required by Section 1.277(a) of the Commission's Rules. |
| 65 (p. 20) | *Denied.* The evidence of record indicates that the sale of the San Francisco Examiner was not an available alternative (Tr. 6310) and Complainants cite no evidence to the contrary. The fact that the Chronicle was never placed on the open market for sale is irrelevant and is not of decisional significance. |
| 73 (p. 21) | *Denied.* The Examiner's finding is correct and is supported by the record. The requested finding is not supported by Complainants' citations to the record. |
| 64 (p. 22) | *Denied.* The record indicates that the increase in advertising rates was caused by an increase in costs (Tr. 4781, 4789, 4804–05). |
| 65 (p. 22) | *Denied.* The requested finding is contrary to the evidence. The record indicates that the rates were never reduced because there was no way to reduce them and not incur losses (Tr. 4803). |
| 67 (pp. 22–23) | *Denied.* It was conceded that the committee was unable to find a situation totally comparable to that in San Francisco, and the Examiner so found (I. D. fn. 29). It cannot be said that the committee erred in choosing Detroit, Michigan, as the next best alternative. |
| 68 (p. 23) | *Denied.* The Examiner's findings are supported by the record (Tr. 5307–15, 6101–02, 6108, KRON Ex. Nos. 177, 187), and the studies were properly accorded evidentiary weight. In addition, Complainants' exception is not supported by a citation to the record as required by Section 1.277(a) of the Commission's Rules. |

| *Exception No.* | *Ruling* |
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| 69 (p. 23), 621 | *Denied.* The record supports the Examiner's characterization of Prof. Rostow as an expert witness (Tr. 6191–97, KRON Ex. No. 193) and his opinions and conclusions were within his area of competence and were subjected to extensive cross-examination. The weight to be accorded Prof. Rostow's expert testimony was within the discretion of the Examiner (*Arc Realty Co.* v. *Commissioner of Internal Revenue*, 295 F. 2d 98, 103, (8th Cir. 1961)). In addition, Complainants' Exception No. 69 (p. 23) is not supported by a citation to the record as required by Section 1.277(a) of the Commission's Rules. |
| 70 (pp. 23–24) | *Denied.* The Examiner's finding is supported by the record, and the Complainants' requested finding is contrary thereto (Tr. 5048–51, 5075–76, 5082–83, 6258–59, 6304–05, 6310). In addition, the requested finding is not supported by a citation to the record as required by Section 1.277(a) of the Commission's Rules. |
| 71 (p. 24, 1st and 2d sents.) | *Denied.* The Examiner's finding is supported by the evidence, and the Complainants' requested finding is contrary thereto (Tr. 4772–73, 5242–43, 5384–85). In addition, the requested finding is not supported by a citation to the record as required by Section 1.277(a) of the Commission's Rules. |
| 71 (p. 24, 3d sent.) | *Denied.* The record indicates that the percentage of advertisers using the combination rate is in line with national trends (Tr. 6117–18, 6127, 6149–50, 6167–68), and the exact percentage in San Francisco is without decisional significance. The "sanctions" alleged by Complainants are not supported by the evidence. The record indicates that the Chronicle Only and the Examiner Only want ads are placed in separate sections of the newspapers for reasons of economy of production (Tr. 4773–74) and that the Chronicle Only section receives the same classification titles and numbers as those advertisements appearing in the combination advertising (Tr. 4831–32). |
| 73 (p. 24) | *Denied.* Complainants' exception is without decisional significance. The Examiner's finding is supported by the evidence, and the Complainants' argument with respect to the burden of proof is without merit. |
| 75 | *Denied.* The record indicates that the linage figures were adjusted to reflect the newspaper strike (Tr. 5225, 6142–43). In addition, Complainants' exception is not supported by a citation to the record as required by Section 1.277(a) of the Commission's Rules. |
| 76 | *Denied.* The Examiner's finding is correct and is supported by the record (Tr. 4446–48, 5419–21, 5439). In addition, Complainants' exception is not supported by a citation to the record as required by Section 1.277(a) of the Commission's Rules. |



109-038—73——3

| *Exception No.* | *Ruling* |
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| 80 | *Denied.* The Examiner correctly found that Chronicle has rights to 70 nationally syndicated features, most of which provide for territorial exclusivity (I. D. paras. 58–60). No useful purposes would be served by enumerating each syndication contract which Chronicle has executed as the Complainants request. Such additional findings would be decisionally insignificant. |
| 84 | *Denied.* The requested finding is contrary to the record (Tr. 4584–85) and is not supported by a citation thereto as required by Section 1.277(a) of the Commission's Rules. |
| 85 | *Denied.* The requested finding is contrary to the evidence (KRON Ex. Nos. 155, 178). In addition Complainants' exception is not supported by a citation to the record as required by Section 1.277(a) of the Commission's Rules. |
| 86 | *Denied.* The requested finding is contrary to the weight of the evidence (Tr. 4989, 5011–15, 5135–42, 5183–84). |
| 87 | *Denied.* The requested finding is contrary to the evidence (Tr. 6100–02, 6108, 6307–09, KRON Ex. No. 187). In addition, Complainants' exception is not supported by a citation to the record as required by Section 1.277(a) of the Commission's Rules. |
| 88 | *Denied.* The Examiner's finding in I. D. para. 76 does not imply that Mr. See's interest in CATV originated in 1964 but only that it matured in 1964. This finding is supported by the evidence of record. (Tr. 1393, 1724, KRON Ex. No. 47). |
| 89 | *Denied.* The requested finding is contrary to the record. Mr. See was referring to pay TV by wire, not CATV (Tr. 1575–76). |
| 90 | *Denied.* See paragraphs 57–60 of our Decision. |
| 93 | *Denied.* The Examiner has found that the purpose of the community luncheon program was to determine community needs and interests (I. D. fn. 42) and his finding is supported by the record. The remainder of Complainants' exception, concerning Mr. See's motives, is speculative, argumentative, and in large part is totally unsupported by the record. |
| 94 | *Denied.* The requested finding, as it concerns Mr. See's motives, is speculative and argumentative. In addition, Complainants' exception is not supported by a citation to the record as required by Section 1.277(a) of the Commission's Rules. |
| 95 | *Denied.* The requested findings, in the first sentence, fourth sentence, and the first clause of the fifth sentence, are adequately outlined in the Examiner's findings in I. D. para. 76. (*Cf.*, our ruling on Complainants' Exception No. 88, *supra*). The remainder of Complainants' exception is speculative, argumentative, and without record support. |
| 97 | *Denied.* Mr. See clarified his position with respect to pay TV (Tr. 1574, lines 16–17). |

| *Exception No.* | *Ruling* |
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| 101–104 | *Denied.* The Examiner found that Mr. See contacted various California communities inquiring about CATV franchises (I.D. para. 76). The record indicates, and Complainants acknowledge in their exceptions, that the contacts referred to were form letters. The record further indicates that these letters were primarily aimed at obtaining information (Tr. 1731, 1733, 2903–04, 2906). Therefore, the texts of these letters and the names of the persons or communities to which they were sent is without decisional significance. |
| 106 | *Denied.* The location of the communities in which Chronicle has filed CATV applications does not reflect adversely upon Chronicle. The record indicates that both KRON and the Chronicle are located in San Francisco and that the parent company owns no broadcast or publishing business elsewhere. We believe, therefore, that it is both reasonable and logical that Chronicle would seek to enter CATV in this same area. |
| 107, 366 (6th sent.) | *Denied.* The requested finding distorts the testimony of Mr. See. He testified that KRON–TV would cover all news stories, if warranted but—"Not to enhance our competitive position." (Tr. 1963). |
| 109 | *Denied.* Since Mr. See was responsible for Chronicle's CATV activities, it was not improper for him to actively promote CATV applications. Nor can it be said that the promotional methods he used were improper. Finally, the Examiner has found that subordinate employees of KRON–TV were utilized on occasion through March, 1967 (I.D. para. 77). |
| 111 | *Denied.* The Examiner's findings are fully supported by the evidence of record (Tr. 1681–83, 2881–82, 3542–43, KRON Ex. No. 33). In addition, Complainants' exception is not supported by a citation to the record as required by Section 1.277(a) of the Commission's Rules. |
| 117 | *Denied.* The Examiner's finding is correct and is supported by the record (Tr. 1620–21, 1776–77, 3074, 3412–13, 3466, 3650–51, 3667). |
| 118 | *Denied.* Mr. See's testimony has been taken out of context. He testified that his interest in Vallejo as a city for a possible CATV franchise was, "Not above any other city." (Tr. 1396) |
| 119 | *Denied.* The Examiner found that Mr. See attended the January 1966, meeting (I.D. fn. 45). The remainder of Complainants' exception is without decisional significance. |
| 120 | *Denied.* In response to an interrogatory concerning the genesis of the Vallejo documentary, Chronicle cited both the March 1965 and March 1966 community luncheons (B.B. Ex. No. 3, p. 48, Tr. 1617). Although Chronicle had no active CATV interest in the area at the time of the first luncheon, Mr. See testified that Chronicle was "within three weeks" of sending out the form letter of inquiry (Tr. 1617). The fact that the documentary was done after the letter was sent does not reflect adversely on the licensee. See also paragraphs 57–60 of our Decision. |

| *Exception No.* | *Ruling* |
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| 121 | *Denied.* The Examiner has found that Chronicle was interested in CATV in the Vallejo area (I.D. para. 93). The correspondence between Mr. See and City Manager Ficklin is not decisionally significant in view of the preponderance of the other evidence developed in this case. |
| 122 | *Denied.* The Examiner has made the findings requested in the first two sentences of Complainants' exception (I.D. paras. 80, 89). The remainder of Complainants' exception is of no decisional significance. |
| 123 | *Denied.* The Examiner's finding is fully supported by the evidence of record (Tr. 1404, 1625–26, 1785–87, 5809–10). |
| 124–131, 133–136 | *Denied.* The Examiner's findings in I.D. paras. 82–88 are complete and accurately reflect the record. Complainants' requested findings reflect primarily the testimony of Mr. Anderson given on direct examination and do not take into account the matters elicited on cross-examination. Although it is apparent that Mr. Anderson had no motive to misrepresent, his testimony clearly shows his "recollection to be dim." |
| 132 | *Denied.* See paragraphs 57–60 of our Decision. |
| 137 | *Denied.* The Examiner found that Mr. See both cautioned Mr. Anderson and discussed the program with him (I.D. para. 81) and that finding is supported by the record. |
| 138 | *Denied.* The Examiner so found (I.D. paras. 81, 84). |
| 139 | *Denied.* KRON Ex. No. 116 refers to news stories (Tr. 3456), not documentaries. There is no support in the record for Complainants' assertion. |
| 140 | *Denied.* The statements made to the Commission in the letters cited were truthful. The "interest" which Chronicle had was limited to the mailing of form letters regarding CATV to a large number of California communities. These letters were primarily aimed at obtaining information (Tr. 1726–27, 1730, 1732–33, 2903–04, 2906). |
| 141, 142 | *Denied.* The record indicates that Mr. See did, in fact, attend the June 27, 1966, meeting but that he left after receiving an award which was the first item on the agenda. He did not attend any portion of the meeting which considered the proposed CATV ordinance (Tr. 1800, 1839, 3468, 3644–45). The purpose for the attendance of the attorneys at the 1967 meetings was to ensure the passage of good, non-punitive, CATV legislation in Vallejo (Tr. 2887–88, 2928–29). The purpose of the luncheon with Mr. Spight was to discuss the possibility of CATV joint ventures, principally in South San Francisco, and although Vallejo was discussed it was only with reference to the defeat of the CATV ordinance the previous day (Tr. 1839–40, Comp. Ex. No. 59). The possibility of a joint venture in Vallejo did not arise until 1967 (Tr. 1412). Mr. Ficklin's letter is completely true and honest. |
| 143 | *Denied.* The "interest" Chronicle had in Vallejo CATV at the time of the community luncheon was only a general one, as evidenced by the fact that only form letters were sent. These letters were primarily aimed at obtaining information (Tr. 1395– |

| *Exception No.* | *Ruling* |
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| | 96, 1413–14, 2903–06). Complainants have taken the quote from Mr. Ficklin's letter out of context (see Tr. 1413). |
| 144 | *Denied.* Mr. See's representation to the Commission was true. The record indicates that in April, 1966, Mr. Hammett verbally reported his conclusion to Mr. See that most of Vallejo received tolerable signals and was "well illuminated" (Tr. 1835–36). Complainants' exception refers to Mr. Hammett's written confirmation of this earlier oral report. |
| 152 | *Denied.* The Examiner's finding is supported by the weight of the evidence. Both Messrs. See and Anderson testified that there was only one meeting between them. (Tr. 1799, 2651). Mr. Anderson's explanation of his language in the June, 1967, tape that they told him "previous to the time [he] . . . went into *production*, why they wanted the show done" (Tr. 2717, emphasis added) further supports the Examiner's finding. |
| 155 | *Denied.* The Examiner found that the San Carlos CATV franchise was not awarded to Chronicle (I.D. para. 112). While Mr. See's statement was inaccurate, it cannot be said that it constituted a misrepresentation to the Commission. The record discloses that Chronicle's subsidiary was not a serious contender for the franchise, since the City Council had decided on an underground system whereas the Chronicle subsidiary continued to propose an overhead system (Tr. 2897, 2927, 2932, 3191–92, 3197, 3198, KRON Ex. Nos. 97, 106). |
| 159 | *Denied.* The Examiner found that Mr. Sutton was formerly employed by Chronicle (I.D. para. 110). The remainder of the requested finding is of no decisional significance. In addition, the requested finding is not supported by a citation to the record as required by Section 1.277(a) of the Commission's Rules. |
| 162 | *Denied.* The Examiner found that an "unusually large" amount of film was shot (I.D. para. 109) and the exact footage is without decisional significance. Complainants' statement that cameramen were "given" a certain amount of film to shoot is inaccurate. B.B. Ex. No. 6 shows how much film was actually shot, not that a certain amount of film was assigned. Similarly, Complainants' comments concerning Mr. Constant are inaccurate. The record indicates not that he complained about the amount of color film shot, but that he merely wanted to know why it was shot. The record also shows that he was satisfied with the answers he received, and that is why he did not pursue the matter. (Tr. 3111, 3424). |
| 165 | *Denied.* The Examiner has made these findings (I.D. para. 109). The requested finding relating to coverage of the renewal hearing is irrelevant. |
| 166 | *Denied.* The Examiner found that it was "unprecedented" for Mr. Kampmann to act as a reporter (I.D. para. 106). Complainants do not take into consideration Mr. Kampmann's testimony as to why he acted in such capacity (Tr. 3727–28). |

| *Exception No.* | *Ruling* |
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| 167 | *Denied.* The Examiner has made most of these findings (I.D. paras. 106, 109) and the others requested would merely be cumulative. Concerning overtime pay, Mr. Kampmann testified that at the time of the 1968 Ball there was a newspaper strike which had caused KRON–TV to expand its news programs and all of the news department staff was placed on overtime (Tr. 3727). |
| 169 | *Denied.* The Examiner found that the decision to expand the show to thirty minutes was made by Messrs. Kampmann, Behrendt, and Noble (I.D. para. 109). Although Mr. See testified that this was his idea, other testimony establishes that he was mistaken in his recollection, and that he did not suggest a thirty minute program (Tr. 3069, 3357, 3358, 3729). |
| 171–173 | *Denied.* The record reflects that the Chicken's Ball was placed on "Community Circle" because "Bay Region Report", where it had been placed in previous years, was no longer being broadcast and "Community Circle" was a color program (Tr. 1487–88, 3725). |
| 174 | *Denied.* The record indicates that no other television stations were contacted regarding coverage of the Ball (Tr. 3142–43). In addition, Complainants' exception is not supported by a citation to the record as required by Section 1.277(a) of the Commission's Rules. |
| 177 | *Denied.* Mr. See testified that he had not made an investigation into this area prior to appearing as a witness and that that was the reason he didn't know of any similar programming (Tr. 1491). |
| 178 | *Denied.* The Examiner has made the findings requested in the first two sentences and the last clause of the third sentence (I.D. paras. 99, 105). Mr. Kelly testified as to why he chose Mr. See as a judge (Tr. 3158, 3178–79). Complainants' requested finding that Mr. See had never seen a Chicken's Ball is contrary to the record (Tr. 3158, lines 10–12). |
| 180 | *Denied.* Complainants' requested findings are of no decisional significance. |
| 183 | *Denied.* The first sentence of Complainants' proposed finding is of no decisional significance. Mr. See's testimony about public relations efforts related to the promotion of KRON–TV's Chicken's Ball coverage, not the CATV franchise (Tr. 1495). |
| 185, 187 | *Denied.* The letter to Mr. Francesconi is without decisional significance. The last sentence of Exception No. 185 is contrary to the evidence, and is not supported by Complainants' citation to the record (see Tr. 3152). |
| 186, 190 | *Denied.* Mr. Kelly's remarks to the City Council were in response to the two preceding presentations, were not pre-planned, and were not made to obtain a competitive advantage (Tr. 3162, 3173–74). Concerning the meeting in the restaurant, the Examiner so found (T.D. para. 101). In addition, Exception No. 190 is not supported by a citation to record as required by Section 1.277(a) of the Commission's Rules. |

| *Exception No.* | *Ruling* |
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| 191, 197, 200–202 | *Denied.* Complainants' requested findings are unsupported conclusions, are argumentative, are not supported by a preponderance of the evidence, and do not contain citations to the record as required by Section 1.277(a) of the Commission's Rules. |
| 193, 195 (1st sent.) | *Denied.* The testimony indicates that the body of Mr. Kelly's letter was a part of Chronicle's CATV public relations effort in San Carlos and that the postscript was not a part of that effort (Tr. 2930, 3175). |
| 196 | *Denied.* The requested finding is of no decisional significance. (See also our ruling on Complainants' Exception Nos. 186 and 190). |
| 199 | *Denied.* The record indicates that the promotional efforts were "as usual" for KRON–TV (Tr. 1495–98). The last sentence of this exception is not supported by Complainants' citation to the record. |
| 204, 366 (8th sent.) | *Denied.* The Examiner's findings are supported by the weight of the evidence. Mr. Kampmann testified that the statements he made were made "in commiseration" with operational personnel in order "to hold the news department together" (Tr. 3701–02, 3784, 3833–34). In addition, Complainants' exceptions are not supported by citations to the record as required by Section 1.277(a) of the Commission's Rules. |
| 205 | *Denied.* Mr. See testified that the letter to the Commission was based upon the best information available at the time (Tr. 1452), and Complainants cite no evidence to the contrary. Complainants' claims for its cross-examination of Mr. See are exaggerated. B. B. Ex No. 5, which furnished the basis for such cross-examination, was produced by KRON pursuant to the Examiner's *Memorandum Opinion and Order*, FCC 69M–1238, released September 30, 1969. The last sentence of Complainants' exception is contrary to the record (KRON Ex. Nos. 68, 116, p. 179, Tr. 1865–66, 1942–43). In addition, portions of Complainants' exception are argumentative in violation of Section 1.277(a) of the Commission's Rules. |
| 208 | *Denied.* Mr. Constant testified that when he found Dr. Alvarez's letter in the files he stopped looking (Tr. 2419–20). His decision to discuss the events with Mr. Kampmann, who was the news director at the time of the library dedication, was not unreasonable. In addition, Complainants' exception contains argumentative matter in violation of Section 1.277(a) of the Commission's Rules. |
| 211 | *Denied.* Messrs. Thieriot and See did not testify that they would not rely on the reputation and experience of KRON–TV in applying for CATV franchises, but that they would not permit their CATV interests to affect the operation and programming of KRON–TV (Tr. 1681, 3542–43). |
| 213 | *Denied.* The Examiner made the findings requested in the first two sentences of Complainants' exception (I.D. paras. 76–77). The finding requested in the third sentence of Complainants' exception is implicit in the Examiner's findings in I.D. paras. 76–77. The remainder of Complainants' exception is without decisional signficance. |

| *Exception No.* | *Ruling* |
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| 214 | *Denied.* As the individual responsible for Chronicle's CATV activities, it was only natural for Mr. See to have undertaken the activities outlined in Complainants' requested finding and no adverse conclusions can be drawn therefrom. |
| 215 | *Denied.* The subsequent unavailability of pole line rights was irrelevant to the merits of the prior award of the San Francisco CATV franchise to Western TV Cable Co. |
| 216 | *Denied.* The record indicates that Mr. See had no knowledge of actions taken at Chronicle's Board of Directors meetings (Tr. 1457–58, 1612–13, 3570). |
| 217, 218 | *Denied.* The Examiner has made these findings (I.D. para. 117). The record indicates that Mr. See often requested coverage of events in suburban communities (KRON Ex. Nos. 161, 162). |
| 219 | *Denied.* Complaints' contention is without merit. The fact that 4 minutes and 20 seconds of news time was devoted to South San Francisco during November, 1966, does not preclude the possibility of residents of that city suggesting more coverage. In addition, Complainants' exception is argumentative in violation of Section 1.277(a) of the Commission's Rules. |
| 220 | *Denied.* KRON Ex. No. 116, pp. 173–180, shows that in 1965 KRON–TV devoted 10 min. 20 sec. to news stories devoted to South San Francisco; in 1966 it devoted 11 min. 55 sec. to such stories; in 1967 it devoted 11 min. 46 sec. (this figure does not include 3 min. 55 sec. which was devoted to a political debate between congressional candidates); and in 1968 it devoted 8 min. to such stories. The variation between these figures is of no decisional significance. |
| 222 | *Denied.* The requested finding presents an incomplete picture of the "must go" technique (see Tr. 2495, 2499–2501, 2503–05, 2574, 3682–83, 3693–94, 3768–69). The memo quoted by the Examiner in I.D. para. 121 indicates that coverage of the library dedication was a "HPS–MG"—a "Harold P. See—Must Go." Further, the Examiner found that the coverage was ordered by Mr. See and that it was questioned by Mr. White (I.D. paras. 117, 118). |
| 225, 226 | *Denied.* Complainants' requested findings do not take into consideration Mr. Kampmann's explanation for his remarks (Tr. 3701–02, 3784, 3833–34). In addition, Complainants' exceptions are not supported by citations to the record as required by Section 1.277(a) of the Commission's Rules. |
| 228 | *Denied.* The Examiner found that Mr. Picken covered the art show (I.D. para. 119); that he received a copy of the memo of December 20, 1966 (I.D. para. 117); and that the art show was covered and broadcast by KRON–TV (I.D. para. 119). That no other radio or television stations covered the library dedication is irrelevant, since the record supports the Examiner's finding that coverage of such events was not unusual at KRON (I.D. para. 126). |
| 229 | *Denied.* The Examiner's finding that Mr. Picken indicated that he would cover the dedication if he could is supported by the record (Tr. 2953). |

| *Exception No.* | *Ruling* |
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| | Complainants' requested finding concerning Mr. Picken's characterization of the library dedication is adequately reflected in the Examiner's finding that the dedication was "hardly an event of gripping interest throughout the bay area. . . ." (I.D. para. 130). |
| 230 | *Denied.* Mr. Picken testified that he was not sure that Mr. White told him of Chronicle's interest in CATV in South San Francisco (Tr. 844–45, 865), and that he did not learn of Chronicle's interest until after the dedication was covered (Tr. 865). The record indicates that the basis for Mr. Picken's state of mind was "news room scuttlebutt" (Tr. 844). |
| 231 | *Denied.* The requested finding is based on heresay. |
| 232 | *Denied.* The Examiner found that the memo was given to Mr. Kihn by Mr. Blair (I.D. para. 121). The remainder of Complainants' exception is of no probative weight since Mr. Blair did not testify in this proceeding. |
| 233 | *Denied.* The Examiner found that KRON frequently mentioned political figures in covering events in which they participated (I.D. para. 126), and the filming of the Mayor of South San Francisco was in line with this policy. The remainder of Complainants' requested finding is of no decisional significance. |
| 234 | *Denied.* The Examiner made the findings requested in the first three sentences of Complainants' exception (I.D. paras. 121, 124–125). The last sentence of Complainants' requested finding is not supported by a citation to the record as required by Section 1.277(a) of the Commission's Rules. |
| 235 | *Denied.* Mr. See testified that the changes requested were not "extensive" and that all competitors for the CATV franchise were invited to comment on the proposed ordinance (Tr. 1529). In any event, the requested finding is of no decisional significance. |
| 236 | *Denied.* Insofar as Complainants' requested finding is relevant, the Examiner so found (I.D. para. 119). |
| 239 (1st sent.) | *Denied.* While Complainants' statement is correct, the variation between the figures is not decisionally significant. |
| 239 (2d sent.) | *Denied.* There is no support in the record that the Mayor or City Council appeared in the dedication story broadcast by KRON–TV, and the Examiner found that there was no reference to these persons therein (I.D. fn. 51). |
| 241 | *Denied.* Mr. Allen testified that Western Communications, Inc. has never applied for a rate increase on any of its systems (Tr. 2898–99). Messrs. See and Allen testified that the former has neither seen nor received a copy of the Kirkeeng memo (Tr. 1527, 2899). |
| 251 | *Denied.* The Examiner's finding is correct and adequately reflects the record (Tr. 1235, 1237, 1248–49, 3072, KRON Ex. No. 16). |
| 264, 265 | *Denied.* The record reveals that Mr. Kampmann often used the "must go" designation on his own initiative (Tr. 3683, 3768, 3769). |

| *Exception No.* | *Ruling* |
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| 267 | *Denied.* The Examiner quoted the relevant portions of this memo (I.D. para. 195). The long-standing policy referred to in Complainants' requested finding was that there be accuracy in any news story broadcast about the Chronicle Publishing Co. (Tr. 1959). The record indicates that the procedures outlined in Mr. See's memo were not generally followed (Tr. 2465, 3705, 3707, 3713). |
| 273 | *Denied.* Mr. Kampmann testified that he rescinded the memo "after about two or three days" (Tr. 3710; see also Tr. 3270–72, 3299–3300). |
| 275 | *Denied.* The Examiner found that Mr. Kampmann issued the memo to preserve newsroom objectivity in reporting labor strife in broadcasting (I.D. para. 197). This is in accord with Mr. See's statement of policy as reflected in his testimony. |
| 276 | *Denied.* Mr. Constant's testimony referred to the last sentence of Mr. Kampmann's memo and there is no evidence it represented KRON policy. Mr. Kampmann testified that he rescinded the memo "after about two or three days" (Tr. 3710; see also Tr. 3270–72, 3299–3300). Mr. See testified that he didn't repeal or revoke the memo because he "didn't pay much attention to it" (Tr. 1599). |
| 277 | *Denied.* Complainants' requested finding is of no decisional significance. Further there is no evidence that Mr. Kampmann's superiors were familiar with the entire contents of the book, and the Examiner found, specifically, that neither Mr. See nor Mr. Constant was aware of the issuance of Mr. Kampmann's memo. |
| 279 | *Denied.* The requested finding is contrary to the weight of the evidence (Tr. 2465, 3259, 3261–62, 3705–07) and is based upon hearsay (Tr. 2103). |
| 282 | *Denied.* The requested finding is contrary to the evidence (Tr. 1374, 1376, 3546–47, 3565) and is argumentative in violation of Section 1.277(a) of the Commission's Rules. |
| 283 | *Denied.* The Examiner's findings that Mr. See's motive was not to suppress news (I.D. para. 141) and that Mr. See acted in a reasonable manner (I.D. para. 140) are correct and are supported by the weight of the evidence (Tr. 1372, 1514, 1517–18). |
| 284 | *Denied.* The requested finding is not supported by the evidence and is a presumption not based on knowledge. |
| 285 | *Denied.* The Examiner found that news of the agreement leaked out (I.D. para. 135). |
| 286 | *Denied.* The requested finding is contrary to the record and is argumentative in violation of Section 1.277(a) of the Commission's Rules. |
| 287 | *Denied.* The Examiner found that all of KRON's newsmen were familiar with the story and that many of them importuned their superiors for permission to cover it (I.D. para. 136). The additional details outlined in Complainants' exception are without decisional significance. The Examiner also made the finding requested in the last sentence of Complainants' exception (I.D. para. 138). |

| *Exception No.* | *Ruling* |
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| 288 | *Denied.* The Examiner made reference to the New York Times story (I.D. para. 135). The remainder of the requested finding is without decisional significance. |
| 291 | *Denied.* Complainants' requested finding is based on hearsay, is of no decisional significance and is argumentative in violation of Section 1.277(a) of the Commission's Rules. |
| 292 | *Denied.* The requested finding is based on hearsay. |
| 296 | *Denied.* The requested finding is not supported by the record. Mr. See testified that he had not viewed the news broadcasts (Tr. 1378–79) and Mr. Sacks' testimony does not show otherwise. |
| 304 | *Denied.* It is implicit in the Examiner's findings in I.D. paras. 138 and 140 that Mr. See did not contact any representatives of the Hearst Corporation. The remainder of this requested finding is speculative and argumentative in violation of Section 1.277(a) of the Commission's Rules. |
| 305, 306 | *Denied.* The Examiner found that KRON covered the story and that only the first part of the story was prepared by Messrs. Constant and Cothran (I.D. para. 139). The record further indicates that a newswriter wrote the remainder of the story from the Chronicle's "dupe" (Tr. 2470–71, 2546). Since the publisher's statement was the only source of the story available (Tr. 2471, 2546), and since the "dupe" was changed, KRON's policy against verbatim use of Chronicle "dupes" was not violated (Tr. 2547–48). In addition, Complainants' Exception No. 306 is argumentative in violation of Section 1.277(a) of the Commission's Rules. |
| 307 | *Denied.* The Examiner found that the story could not be covered until an official announcement was made (I.D. para. 138). The publisher's statement was the only source of the story available (Tr. 2471, 2546). The remainder of Complainants' exception is without decisional significance. |
| 308 | *Denied.* The substance of the testimony cited is to the effect that there was a limit on the type of reporting which could be done prior to an official announcement by the newspapers, and the Examiner so found (I.D. para. 136). After the story broke there was no such limit (Tr. 953–56). |
| 309 | *Denied.* The requested findings are based on hearsay. Mr. Kihn also testified that he knew of no other station having done a documentary on the merger (Tr. 526). |
| 315 | *Denied.* The requested finding is argumentative in violation of Section 1.277(a) of the Commission's Rules and is composed of subjective judgments of the type of questions asked and the type of report broadcast. Further, there were no Justice Department, advertiser, or union representatives at the luncheon (KRON Ex. No. 75). |
| 317, 318 | *Denied.* The requested finding is contrary to the weight of the evidence, and Mr. White has admitted to lapses of memory (Tr. 2098–2100). |
| 321 | *Denied.* The Examiner's findings at I.D. para. 145 are supported by the record (Tr. 413, 415, 420, 436, 1144, 1149–51). |

| *Exception No.* | *Ruling* |
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| 322 | *Denied.* The Examiner's findings at I.D. para. 146 are supported by the record (Tr. 2483–84). With respect to the relationship between Mr. Cothran and his superiors, the testimony of Messrs. Kihn and White is hearsay. Further Comp. Ex. No. 4 was issued after Mr. Cothran left KRON–TV, and the record reflects that the procedures outlined in Comp. Ex. No. 3 were not generally followed (Tr. 2465, 3705, 3707, 3713). |
| 324 (1st sent.) | *Denied.* The Examiner's finding in I.D. para. 144 is supported by the evidence (Tr. 2480–81, 3604, 3715, KRON Ex. No. 12). |
| 324 (2d sent., *et seq.*) | *Denied.* Mr. Constant did not testify that there was a threatened I.B.E.W. strike, however negotiations were going on (Tr. 3334–35, 3603–04). To the extent that Complainants' requested findings go into greater detail than the Examiner's findings at I.D. paras. 142–144, they are cumulative and are not decisionally significant. |
| 325 | *Denied.* The Examiner's findings in I.D. para. 144 adequately cover the findings requested in the first two sentences of Complainants' exception. The fact that KRON did not cover the first day of the strike is not decisionally significant, since the record reveals that the remainder of the strike was covered. The last sentence of this exception is not supported by Complainants' citations to the record. |
| 326 | *Denied.* The first sentence of Complainants' exception is not supported by the weight of the evidence (Tr. 2480–81, 3715). Mr. Fleming's complaint about the news story stemmed not from KRON but from his own interviews of union members (Tr. 971–72). The last sentence of Complainants' exception is not supported by a citation to the record as required by Section 1.277(a) of the Commission's Rules. |
| 328 | Complainants have filed no exception so numbered. |
| 329 | *Denied.* The Examiner's findings at I.D. para. 148 are correct and are supported by the record (Tr. 1601, 1852–53, 2410, 3331, 3551, 3846–47). Comp. Ex. No. 4 was issued on April 6, 1967, whereas the threatened strike was on March 15–17, 1967. The reasons for issuing the Kampmann memo had nothing to do with the 1967 threatened Teamster's strike (see I.D. paras. 195–196). The last sentence of Complainants' exception is contrary to the weight of the evidence (Tr. 2465, 3259, 3261–62, 3705–07) and is based on hearsay (Tr. 2103). In addition, Complainants' exception contains argumentative matter in violation of Section 1.277(a) of the Commission's Rules. |
| 330 | *Denied.* The Examiner's findings at I.D. para. 147 and fn. 56 adequately cover this matter. Complainants' requested finding is contrary to the record, is argumentative, and the last paragraph is not supported by a citation to the record as required by Section 1.277(a) of the Commission's Rules. |
| 331 | *Denied.* The threatened Guild strike occurred during February, 1966 (see I.D. para. 142). The reference at Tr. 2974 to February, 1967, is a reporter's error. The settlement of the threatened February, 1966, strike resulted in a three-year contract (KRON Ex. No. 12, pp. 11–12). The Examiner found that the strike threat was covered by KRON–TV. |

| *Exception No.* | *Ruling* |
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| 333 | *Denied.* There is no evidence that the filming of the pickets was in any way unusual. |
| 334 | *Denied.* The requested finding is not supported by the evidence of record. In addition, it is argumentative and does not contain a citation to the record as required by Section 1.277(a) of the Commission's Rules. |
| 335 | *Denied.* The Examiner's finding at I.D. para. 153 is correct and is supported by the record. The cited testimony of Mr. Kihn (Tr. 425–26) is his own subjective judgment of the coverage. The cited testimony of Mr. White (Tr. 2107, 2112–13) is not supported by the weight of the evidence (Tr. 2996–97, 3000, 3002–03; see also I.D. paras. 154–156). Mr. Raudebaugh also testified that the coverage by KRON–TV was "no better or no worse than any other television station" (Tr. 2969; I.D. para. 164). |
| 338 | *Denied.* Complainants' exception is without support in the record. In addition, it is argumentative in violation of Section 1.277(a) of the Commission's Rules. |
| 339 | *Denied.* The Examiner's findings at I.D. para. 193 adequately cover this matter. Mr. Constant's explanation is reasonable and is uncontradicted (Tr. 3606). The last sentence is argumentative and is not supported by a citation to the record as required by Section 1.277(a) of the Commission's Rules. |
| 340, 341 | *Denied.* The Examiner's findings at I.D. para. 193 adequately cover this matter. The additional details provided in Complainants' exception are without decisional significance. The record indicates that the story was run (Tr. 3288–89). |
| 342 | *Denied.* The first sentence of Complainants' exception distorts the record. Mr. Constant testified that the statement of management in the first story was meaningless (Tr. 3345). No changes in Mr. Burton's story were made by Mr. See (Tr. 3346). The last sentence of this requested finding is of no decisional significance. |
| 343 | *Denied.* Mr. Burton testified that the story was covered and written prior to his meeting with Mr. See and that he met with Messrs. See and Constant in order to get a statement of management's side of the story (Tr. 3287–89, 3304–05). |
| 347 | *Denied.* The Examiner's finding at I.D. para. 155 and fn. 57 correctly and adequately reflects the record (Tr. 2057–58, 3718). Mr. See's representation to the Commission was truthful and Complainants have not shown otherwise. |
| 348 | *Denied.* Complainants' requested finding is not supported by the record (KRON Ex. Nos. 76, 77, 101, 102). |
| 354 (2nd para.) | *Denied.* There is no evidence of record supporting Complainants' requested finding that Canadian Pacific Airlines was a substantial advertiser in the Chronicle newspaper and over KRON–TV. The evidence is to the contrary (B.B. Ex. No. 4, Att. II–1, II–2). The mentions of Canadian Pacific Airlines were due to the fact that it donated the first prizes for the tournament (Tr. 3385, KRON Ex. No. 95, p. 5, KRON Ex. No. 120). |

| *Exception No.* | *Ruling* |
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| 355 | *Denied.* Complainants' requested finding is contrary to the evidence, is argumentative, and is not supported by a citation to the record as required by Section 1.277(a) of the Commission's Rules. |
| 357 | *Denied.* The requested finding is of no decisional significance. The record indicates that KRON–TV has covered this event from 1961 through 1969 with the exception of 1966 (KRON Ex. No. 78). The last sentence of Complainants' exception is argumentative in violation of Section 1.277(a) of the Commission's Rules. |
| 358 | *Denied.* The Examiner's finding at I.D. para. 199 is supported by the record. With respect to Canadian Pacific Airlines see our ruling on Complainants' Exception No. 354 (2d para.), *supra.* |
| 359 | *Denied.* The script as broadcast contains references to all of the subjects mentioned in Complainants' requested findings (KRON Ex. No. 18, pp. 1–2, 5–6; Tr. 1318–20). The portion deleted dealt with specific magazines and was deleted on the advice of counsel (KRON Ex. No. 19; Tr. 1313–14). |
| 360, 361 | *Denied.* Complainants' requested findings have no support in the record. In addition, they are argumentative and contain no citations to the record as required by Section 1.277(a) of the Commission Rules. |
| 363 (2d sent., *et seq.*) | *Denied.* See paragraphs 41–48 of our Decision. In addition, Complainants' exception contains a discussion of law in violation of Section 1.277(a) of the Commission's Rules. |
| 366 (1st sent.) | *Denied.* The Examiner's findings in I.D. para. 107 and 108 are correct and are supported by the weight of the evidence. See also paragraphs 56–60 of our Decision and our ruling on Complainants' Exception No. 204, *supra.* |
| 366 (9th–12th sents.) | *Denied.* See paragraphs 56–60 of our Decision. In addition, Complainants' exceptions are argumentative, contain discussions of law and are not supported by citations to the record as required by Section 1.277(a) of the Commission's Rules. |
| 366 (13th sent.) | *Denied.* The portion of I.D. para. 128 to which Complainants take exception is correct and is supported by the weight of the evidence. |
| 367 | *Denied.* The decision was made after consultation with, and upon the advice of counsel and was not an immediate reaction (I.D. paras. 215–216). |
| 368–374, 377–379, 382, 385–387, 389–412, 416–436, 438–451, 454, 456–460, 463–473, 485–488, 490, 492, 493, 496–500, 502, 505, 507–513, 516–521, 535–542, 544–556, 558, 560–565, 567, 568 (1st sent.), 569, 571–574, 592. | *Denied.* The Examiner's findings and conclusions at I.D. paras. 214–235 and 267 are correct and adequately reflect the relevant portions of the record. The additional details provided in Complainants' requested findings are of no decisional significance. See, however paragraphs 62–66 of our Decision. In addition, the following exceptions are argumentative and/or contain no citations to the record in violation of Section 1.277(a) of the Commission's Rules: Nos. 391, 393, 396, 416, 417, 419, 420, 424, 426, 432, 439–441, 446, 450, 467, 468, 487, 505, 510, 519, 520, 535, 536, 547, 550, 556, 563, 571–573, and 592. |

| *Exception No.* | *Ruling* |
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| 375 | *Denied.* The record reveals that the investigators were also instructed not to alert Mr. Kihn under any circumstances, and the Examiner so found (I.D. paras. 218, 267; Tr. 7278–79, KRON Ex. Nos. 201–203). |
| 376 | *Denied.* The motives of an individual may affect the question of credibility (Tr. 7153, 7162). The last sentence of I.D. para. 215 adequately covers the last sentence of Complainants' requested finding. |
| 380 | *Denied.* The testimony reveals that the specific emphasis contained in the oral and written instructions to the investigators was not a normal procedure (Tr. 7323–24, 7346–47). |
| 381 | *Denied.* Complainants' requested finding is an unsupported conclusion. In any event, the Examiner's finding at I.D. para. 220 adequately and correctly reflects the record. |
| 384 | *Denied.* Concerning subparagraph (A), the statements allegedly edited out of the investigators' reports appear in substance in the final reports of the investigating firm (compare, *e.g.*, Tr. 7214–17, with KRON Ex. No. 209, pp. 65–67, 84). Subparagraphs (B) and (C) do not support Complainants' contention. In addition, Complainants' requested finding is argumentative in violation of Section 1.277(a) of the Commission's Rules. |
| 388, 413 | *Denied.* Mr. Wichelmann's testimony was clarified on cross-examination (Tr. 6746, 6741). |
| 414, 415 | *Denied.* Mr. Raymer testified that since he knew that Mr. Kihn's charges were false, the initial investigation did not have as its primary purpose the investigation of those charges but rather the motives and associations of Mr. Kihn (Tr. 6858–61). In addition, Complainants' exceptions are not supported by citations to the record as required by Section 1.277(a) of the Commission's Rules, and Exception No. 415 is argumentative in violation of the same rule. |
| 437 | *Denied.* The requested finding is contrary to the weight of the evidence (Tr. 6677–78). |
| 452 | *Denied.* Complainants' have misinterpreted the cited testimony (Tr. 7115–16). |
| 453 | *Denied.* The suggestion to move into Mr. Kihn's apartment came from Miss Hausmann and not Mr. Orwitz (Tr. 6969, 7192), and Mr. Green specifically rejected this idea (Tr. 7195–96). |
| 455 | *Denied.* Mr. Wichelmann testified that he did not start dating the former baby sitter until March or April, 1970 (the investigation was discontinued in June, 1969), that she knew of his prior participation in the case, and that they did not discuss the case (Tr. 6745–46). In addition, Complainants' requested finding is not supported by a citation to the record as required by Section 1.277(a) of the Commission's Rules. |
| 461 | *Denied.* The requested finding does not take into consideration Dianne Kihn's testimony on cross-examination that Mr. Spillane had visited her as a result of a letter she had written to KRON–TV in which she indicated she had information "regarding the ruthlessness of Mr. Al Kihn's character" (Tr. 6949–50). |

| *Exception No.* | *Ruling* |
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| 474 | *Denied.* Complainants' requested finding ignores Mr. Green's testimony that each investigator would generally choose his own particular subterfuge (Tr. 6525–26, 6555). In addition, Complainants' exception is speculative and argumentative, in violation of Section 1.277(a) of the Commission's Rules. |
| 475, 476 | *Denied.* The record reveals that Mr. Green chose the potential interviewees from persons he felt would be the least likely to inform the Complainants and who had some differences of opinion with them (Tr. 6523–24, 6551–52). |
| 477–479 | *Denied.* The Examiner found that a background investigation was recommended and completed and that such an investigation involved checking all available public records (I.D. paras. 217, 219). The additional details outlined in Complainants' exceptions are of no decisional significance. In addition. Exception No. 478 does not contain a citation to the record as required by Section 1.277 (a) of the Commission's Rules. |
| 480–484 | *Denied.* The record reflects that no instructions were given to inquire about the private sex lives of Complainants. The information received by the investigators on this subject was volunteered by certain interviewees (Tr. 6520–21, 6541–42, 6751–53, 6762, 6764, 6900–A). See, however, paragraphs 62–66 of our Decision. |
| 489 | *Denied.* Prior to the interview with Mr. Winkelmann it was not known where Mr. Kihn resided between December, 1963, and April 1964 (KRON Ex. No. 207, p. 17, note). |
| 491, 570 | *Denied.* The requested findings are speculative, argumentative and are not supported by Complainants' citations to the record. |
| 494 | *Denied.* The first sentence of the requested finding is contrary to the record (Tr. 6662–63). The remainder of the requested finding is not supported by Complainants' citation to the record. |
| 495 | *Denied.* There is no evidence that Mr. Wichelmann asked Mr. Kurtz any questions about the private sex life of Mr. Kihn, and Complainants' citations to the record do not show otherwise. The evidence is to the contrary (see our ruling on Complainants' Exception Nos. 480–484). The last sentence of this exception is speculative, argumentative and is not supported by a citation to the record as required by Section 1.277(a) of the Commission's Rules. |
| 501 | *Denied.* Mr. See placed the emphasis on not alerting either Complainant that they were being investigated (Tr. 6516, 6578–79, 7259), and it cannot be said that the interviews under subterfuge violated this instruction. |
| 506 | *Denied.* This information was gathered and used for impeachment purposes (Tr. 7053–58, 7081–82) and was public information (Tr. 7081). |
| 514 | *Denied.* The requested finding distorts the record (Tr. 6853, 7294–95). In any event it is of no decisional significance. |
| 523–532 | Complainants have filed no exceptions so numbered. |

| *Exception No.* | *Ruling* |
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| 543 | *Denied.* Complainants' requested finding is contrary to the record (KRON Ex. No. 206, p. 23). |
| 557, 594 | *Denied.* The Examiner's finding at I.D. para. 133 is correct and is supported by the evidence of record (see Tr. 6830–31). In addition, Exception No. 557 is not supported by Complainants' citation to the record and Exception No. 594 contains no such citation, as required by Section 1.277(a) of the Commission's Rules. |
| 559 | *Denied.* Complainants' requested finding is not supported by the record. In addition, it is argumentative and does not contain a citation to the record, as required by Section 1.277(a) of the Commission's Rules. |
| 566 | Complainants have filed no exception so numbered. |
| 568 (2nd sent.) | *Denied.* Mr. Lindberg was no longer employed by Neilson and Green at the time he purchased the subscription (Tr. 7296–97). |
| 575–579, 581, 582, 590, 591. | *Denied.* Complainants' requested findings are unsupported conclusions. In addition, they are argumentative and do not contain citations to the record as required by Section 1.277(a) of the Commission's Rules. |
| 580, 583 (p. 138) 586, 593, 625, 628–634. | *Granted* to the extent reflected in paragraphs 62–66 of our Decision and *denied* in all other respects. |
| 583 (p. 137) | *Denied.* This proposed finding is technically not an exception but rather an explanation by Complainants' counsel of his purpose for reciting certain information contained in previous exceptions. |
| 587–589 | *Denied.* The requested findings are of no decisional significance. In addition, Complainants' Exception Nos. 588 and 589 do not contain citations to the record as required by Section 1.277(a) of the Commission's Rules. |
| 595 | *Denied.* There is no evidence that the Examiner permitted a "generalized study of the programming" of KRON. The Examiner's findings relate primarily to the news, documentary, public service, agricultural, and religious programming of the station (I.D. paras. 200–213), and such an examination was contemplated by the Review Board's decision adding this issue (18 FCC 2d 120). Further, there is ample precedent for considering such evidence in mitigation of adverse findings under existing issues (see, *e.g.*, *Westinghouse Broadcasting Co., Inc.*, 22 R.R. 1023 (1962); *General Electric Co.*, 2 R.R. 2d 1038 (1964); *Wagoner Radio Co.*, 12 FCC 2d 978 (1968); and *Bluegrass Broadcasting Co., Inc.*, 14 FCC 2d 788 (1968)). Finally, Issue 4 was not considered in association with the investigative issue as Complainants have stated. |
| 596, 597, 644 | *Denied.* The Examiner did not consider the evidence adduced under Issue 4 in reaching his ultimate decision (I.D. para. 262). The Examiner's "comments" at I.D. para. 263 are supported by the record, and the Complainants presented little evidence to rebut the program showing of KRON (I.D. para. 213). |



109-038—73——4

| *Exception No.* | *Ruling* |
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| 598, 639 | *Denied.* The Examiner's conclusions at I.D. paras. 236–241 are correct and are supported by the weight of the evidence. Complainants' proposed conclusion in Exception No. 598 assumes a five county relevant market whereas the Examiner properly chose the entire nine county Bay Area as the relevant market. The Examiner's conclusion at I.D. para. 241 correctly reflects Commission policy and precedent. In any event, the Examiner's ultimate conclusion on this issue was not based thereon. (See also our rulings on Complaintants' Exception Nos. 1–5, 7, 8, 38, *supra.*) |
| 599, 640, 641 | *Denied.* The Examiner's conclusions at I.D. paras. 242–251 are correct and are supported by the weight of the evidence. Further, there is no basis in the record for the conclusions requested by Complainants. (See also our rulings on Complainants' Exception Nos. 43 (p. 15), 47, 66 (p. 20), *supra.*) |
| 600 | *Denied.* The Hearing Examiner's conclusion at I.D. para. 245 is correct and is supported by the weight of the evidence. The record reveals that prior to 1960, Chronicle's promotional efforts were no more extensive than those of the San Francisco Examiner (Tr. 5042–44, 5179 (second page so numbered), 5190). After 1960 it was the San Francisco Examiner which initiated intensified promotional efforts (Tr. 5047, 5114, 5117, 5125, KRON Ex. No. 171, Table 3). |
| 601 | *Denied.* See our Decision dealing with this matter. |
| 602, 642 | *Denied.* The Examiner's conclusions at I.D. para. 248 are correct and are supported by the weight of the evidence. The requested conclusions relating to advertising rates are not supported by the record (see our rulings on Complainants' Exception Nos. 64 (p. 22), 65 (p. 22), 66 (p. 22), *supra*). The requested conclusions concerning syndication contracts and supplementary news services are contrary to the record (see our rulings on Complainants' Exception Nos. 76–84, *supra*). |
| 603, 604, 643 | *Denied.* The Examiners' conclusions at I.D. paras. 254–261 are correct and are supported by the weight of the evidence. (See also our rulings on Complainants' Exception Nos. 88–366). |
| 605, 622–624, 626, 627, 635, 636. | *Denied.* The Examiner's conclusions at I.D. paras. 264–269 are correct and are supported by the weight of the evidence. (See also our rulings on Complainants' Exception Nos. 367–594, *supra*). |
| 606 | *Denied.* We have thoroughly reviewed the record relative to the excluded testimony of Messrs. McCabe and Berner (Tr. 3862–70, 4033–35, 4038, 4405–06, 4482–83, 4706–11; B.B. Proffer No. 2; KRON Proffer No. 3), and we conclude that the Examiner's ruling was correct. The Examiner based his ruling first on Constitutional grounds and later on the grounds of relevance and materiality. We affirm on both grounds. *United States* v. *Citizen Publishing Co.*, 394 U.S. 131 (1969), relied on by Complainants is inapposite since the excluded testimony in no way concerns business or commercial advertising practices of the newspaper which would limit the protection of the First Amendment. Likewise, *Red Lion Broadcasting Co.* v. *Federal Communica-* |

| *Exception No.* | *Ruling* |
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| | *tions Commission*, 395 U.S. 367 (1969) is not controlling here. Further, the excluded testimony in no way relates to the use of the broadcast stations to advance the interests of the publishing company and is thus not relevant or material to the issues of this proceeding. Moveover, there is no evidence that the failure to publish Mr. McCabe's column was more than an isolated instance or that the dismissal of Mr. Berner was for reasons other than those expressed in Mr. Newhall's letter (KRON Proffer No. 3, p. 10). Finally, the Examiner's ruling was clearly within his discretion, *Chronicle Broadcasting Co.*, 20 FCC 2d 33, fn. 11 (1969); *Chronicle Broadcasting Co.*, 20 FCC 2d 903, 909–10 (1969). |
| 607 | *Denied.* The Examiner's ruling was correct. The matters sought to be elicited by Complainants were strictly intra-Hearst matters and were outside the scope of this proceeding (Tr. 4722, lines 7–14). While Complainants' argument with respect to admissions of a co-conspirator is valid when a conspiracy has been established, that is not the case here, as the Examiner properly found (Tr. 4697–98). |
| 608, 618 | *Denied.* The Examiner's rulings were correct. Yet, even if they were not so, the exclusion of the testimony of Messrs. Sparks and Craemer and of Complainants' Ex. No. 92 was not prejudicial. The syndication contracts themselves were placed in evidence (B. B. Ex. No. 33), and the Examiner found that Chronicle requests provisions for territorial exclusivity in its syndication contracts and that Chronicle does not make a practice of waiving those provisions (I.D. paras. 59, 62). |
| 609 | *Denied.* Contrary to Complainants' assertion, the Examiner quashed the subpoena on the ground of attorney-client privilege (Tr. 2204) and not on the ground of work product, and his ruling was correct. |
| 610 | *Denied.* The Examiner's ruling was correct for the reasons he stated (Tr. 2923–24). *WNER Radio, Inc.*, cited in Complainants' brief, is distinguishable. |
| 611 | *Denied.* The Examiner's rulings were correct. Prof. Barnett failed to qualify as an expert witness and his opinions were therefore, inadmissible. Complainants' contention that the transcript of the Senate hearing is admissible under the official records exception to the hearsay rule is without merit. Concerning Prof. Barnett's status as a public witness, see Tr. 7246–53. |
| 612 | *Denied.* The Examiner's ruling was correct. Prof. Owen testified that his study contained no information relating to the rates of any particular firm, including the Chronicle and KRON–TV (Tr. 4350–51). See also the Examiner's statement at Tr. 5205–06. |
| 613 | *Denied.* The Examiner's rulings are correct for the reasons he stated (Tr. 3937–60, 4671–87). |
| 614 | *Denied.* The Examiner's ruling was correct (Tr. 5727–28). Complainants did not demonstrate the relevance of the proffered exhibits to the programming issue. |

| *Exception No.* | *Ruling* |
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| 615 | *Denied.* Complainants' contention is without merit. The Banzhaf and ASH petitions were considered in our designation order (16 FCC 2d 882), wherein we stated: ". . . the licensee has been making substantial efforts to meet the essence of our holding that . . . it must devote a significant amount of time to informing the listeners of the health issue posed by cigarette smoking. . . ." Complainants have offered no evidence to the contrary. |
| 616 | *Denied.* The Examiner's ruling was correct. There is no evidence that "Where the Bay Begins" was the only program that resulted from the March, 1966, community luncheon (Tr. 2843–49). |
| 617 | *Denied.* The Examiner's ruling admitting KRON Ex. Nos. 204–210 was correct for the reason he stated at Tr. 6612. Further, no prejudice has resulted since these exhibits have been sequestered. |
| 619 | *Denied.* The Examiner's ruling was correct. The evidence was relevant and material to show the reasonableness of the actions taken by the principals of KRON. |
| 620 | *Denied.* The Examiner's rulings were correct. Mr. Evans was properly qualified as an expert witness (Tr. 7134–39) and his opinions were admissible. Yet, even if this were not so, the testimony of Chief Nelder and Mr. Sims covers the same points as those made by Mr. Evans. |
| 637 | *Denied.* The Examiner's ruling on Complainants' motion was correct (Tr. 3896–97, 3899–3900). As the Examiner stated, twelve months were permitted for the preparation of the case for hearing, and Complainants have consistently opposed all suggestion for and continuance thereof (Tr. 39–41, 45, 61–62, 72, 251, 253, 255). We cannot now accept Complainants' argument that they had insufficient time to prepare for hearing, or that by virtue of the Examiner's ruling they were denied a fair hearing and due process of law. The Examiner's ruling was clearly within his discretion (see Section 1.243(f) of the Commission's Rules) and "will not be overturned in the absence of a clear abuse of discretion by arbitrary or capricious action." *Selma Television, Inc.*, 3 FCC 2d 63, 64 (Rev. Bd. 1966). Complainants have made no such showing. *Gale Broadcasting Co.*, cited in Complainants' brief is clearly distinguishable. In that case only about two months had elapsed between the designation for hearing and the certification of the record to the Commission (see footnote 1). |
| 638 | *Denied.* The Examiner's order was correct and was a proper exercise of his discretion (see Sections 0.341 and 1.44(d) of the Commission's Rules). Moreover, there were adequate grounds for denying the motion on its merits. |
| 645 | *Denied.* The Examiner's ultimate conclusion at I. D. para. 270 is correct and is supported by the weight of the evidence. Complainants' requested conclusion is not supported by the evidence. |

*Rulings on Limited Exceptions of Chronicle Broadcasting Co. to the Initial Decision*

| *Exception No.* | *Ruling* |
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| 1–4, 12–14, 16, 17, 22, 23, 25, 27. | *Denied.* The Examiner's findings represent a fair and reasonable recapitulation of a preponderance of evidence and are adequately supported by the record. |
| 5 | *Granted.* Para. 12(b) of the Examiner's decision is amended to read ". . . 18.4% read the Tribune; . . . ." instead of ". . . 10.4% read the Tribune; . . . ." |
| 6 | *Granted,* The last clause of the second sentence of I.D. para. 24 is amended to read ". . . and its thirteenth, ninetieth." instead of ". . . and its thirteenth, nineteenth." |
| 7 | *Denied.* The Examiner's findings at I.D. para. 33 adequately reflect the record. See also our ruling on Complainants' Exception No. 600, *supra.* |
| 8 | *Denied,* The Examiner's findings at I.D. para. 37 adequately reflect the record. See also our ruling on Complainants' Exception No. 48 (2d sent.), *supra.* |
| 9–11 | *Granted* to the extent reflected in our Decision and *denied* in all other respects. |
| 15, 24 | *Denied.* The Examiner's findings adequately reflect the record. The additional findings requested by Chronicle are of no decisional significance. In addition, Chronicle's exceptions contain argumentative matter in violation of Section 1.277(a) of the Commission's Rules. |
| 18, 19, 21 | *Denied.* The Examiner's findings at I.D. paras. 122–123, 128 (5th sent.), and 129 (1st sent.) adequately reflect the record. With respect to the last clause of the last sentence of Chronicle's Exception No. 18, see I.D. fn. 51. |
| 20 | *Denied.* The Examiner's finding at I.D. para. 128 adequately reflects the record. Kampmann's subordinates were also See's subordinates. |
| 26 | *Granted* to the extent reflected in our Decision and *denied* in all other respects. See also I.D. para. 237 (5th sent.). |
| 28 | *Denied.* The Examiner's ruling was correct for reasons he stated (Tr. 699). |
| 29 | *Denied.* The Examiner's ruling was correct. Mr. Anderson testified under oath in this proceeding, and portions of KRON Ex. No. 87 were read into the record. The Examiner's finding at I.D. para. 88 was based on one of the portions read into the record (Tr. 2718). The remainder of the exhibit was irrelevant and was properly rejected by the Examiner. |
| 30 | *Denied.* The Examiner's rulings rejecting KRON Ex. Nos. 135, 136, and 137 on the grounds of relevance and materiality were correct. |
| 31 | *Denied.* The Examiner's ruling was correct. We have reviewed KRON Proffer No. 1 and believe that it is not relevant to this proceeding. |
| 32 | *Denied.* We have reviewed KRON Proffer No. 4 and conclude that the Examiner's ruling was correct for the reasons he stated (Tr. 5696–98). |
| 33, 34 | *Denied.* The Examiner's rulings were correct on the grounds of relevance and materiality. |

DISSENTING OPINION OF COMMISSIONER NICHOLAS JOHNSON

On March 20, 1969, based on serious and substantial allegations in a petition to deny filed by Albert Kihn and Blanche Streeter, the FCC designated a hearing on Chronicle Broadcasting Company's applications to renew its licenses for KRON–TV and KRON–FM, San Francisco, California. Today, after four years of procrastinated maneuvering, the majority—like the Hearing Examiner before it—literally twists and squirms in order to avoid the impact of its own findings. In the face of immense problems of concentrated media control, anticompetitive practices, and illegal harassment of certain concerned members of the public, the majority, in what is by all odds one of its most outrageous decisions to date, simply winces and renews Chronicle's licenses. I dissent.

In its initial designation order, the Commission allegedly sought to discover (1) whether the licensee's parent, Chronicle Publishing Co. (Chronicle) had amassed an undue concentration of media control in the San Francisco market; (2) whether Chronicle had engaged in anticompetitive practices with respect to its newspaper ownership and affiliations; and (3) whether Chronicle had employed its enormous media power in an effort to manage the news for the purposes of further expanding its burgeoning communications empire. 16 F.C.C. 2d 882 (1969). Subsequently, in the summer of 1969, the Review Board enlarged these issues in order to consider whether the public interest had been served by the licensee's covert "investigation" of the two citizens who had initiated this proceeding by filing petitions to deny Chronicle's license renewal applications. 18 F.C.C. 2d 120 (1969).

That hearing is now completed. Indeed, that hearing—and the staff's resolution of the complainant's exceptions to the Hearing Examiner's findings—have been completed for several months.[1] Now, at last, the majority is prepared to issue its decision which concludes—not surprisingly, but nevertheless remarkably—that renewal of these licenses will serve the public interest. With this bizarre example of FCC wishfulfillment I cannot agree.

I. CONCENTRATION OF MEDIA CONTROL AND ITS ABUSES

Aside from its ownership of KRON–TV–FM, Chronicle also owns the San Francisco Chronicle—one of the city's two daily newspapers—and is part owner and publisher of the city's only Sunday paper. Chronicle also owns Western Communications Inc., a CATV management company which, itself, owns and operates—contrary to FCC policy—several cable systems within KRON–TV's grand B contour.[2]

[1] Why this hearing and review process has lasted for so many years is, itself, an interesting question. Professor Stephen Barnett has suggested that by having its 1968 renewal application designated for such a prolonged hearing process, KRON has retained all the benefits of operating its station without the additional responsibilities of filing for future renewals, without the need for informing either the public or the FCC of its programming plans, and without the risk of dealing with a potential competing application. *See* Barnett, "A Kronic Case," *San Francisco Magazine*, 38 (April 1973). As Professor Barnett adds: "The Commission typically moves like a snail when this suits the interests of broadcasters, as it usually does."

[2] These cable interests, of course, conflict with the FCC's rules barring broadcasters from owning or having interests in cable systems in the same market. 47 CFR § 76.501. Presumably, then, Chronicle is in the process of resolving these rule violations through divestiture proceedings.

Chronicle has also entered into a possibly illegal joint operating agreement with San Francisco's only other daily newspaper, the *Examiner*, and, among other things, this agreement has produced a commonly owned corporation to handle both newspapers' advertising and circulation affairs.

In view of these ownership patterns, coupled with substantial interlocking directorships and management at the highest levels, it is no wonder that the Hearing Examiner observed that Chronicle has a "powerful voice" in the San Francisco area. Yet, despite this obviously euphemistic description of Chronicle's media power, the majority has no difficulty concluding that renewal of these broadcast licenses will serve the interests of the San Francisco public.

First, the majority hesitates to reach the concentration issue at all, on the grounds that the FCC is currently considering the problem of newspaper-broadcast cross-ownership in a rulemaking proceeding, FCC Docket No. 18110. On March 25, 1970, subsequent to the hearing designation in the instant case, the FCC issued a notice of proposed rulemaking designed to foster a diversity of communications services and viewpoints by limiting newspaper-broadcast cross-ownership in the same market. *Further Notice of Proposed Rulemaking*, 22 F.C.C. 2d 339 (1970. In *Hale* v. *FCC*, 18 P.F. RR2d 2014 (1970), the United States Court of Appeals for the District of Columbia approved the FCC's policy of deferring questions of newspaper cross-ownership in the context of adjudicatory proceedings pending the Commission's resolution of Docket 18110.

That case was decided in 1970. At that time, such judicial deference to the FCC's desire to formulate a coherent policy prior to the application of such policy in adjudicatory proceedings might have appeared reasonable. However, it is by now mid-1973, and the resolution of the FCC's never-ending newspaper cross-ownership docket is nowhere in sight.

At this late juncture, no court could possibly approve this Commission's blatant policy of deferring to a rulemaking proceeding which was allegedly initiated to resolve a very serious problem, but which is really nothing more than a means of avoiding the need to examine that problem in the context of renewal proceedings. Professor Stephen Barnett has dubbed this ingenious practice the FCC's "shell game," *see* Barnett, *The FCC's Nonbattle Against Media Monopoly*, COLUMBIA JOURNALISM REVIEW, 43 (Jan/Feb 1972), and the majority has repeatedly sought refuge in this game in order to avoid having to deal with problems of newspaper-broadcast cross-ownership. *See, e.g., Application of RadiOhio, Inc.*, 38 F.C.C. 2d 721, 748 (1972). The instant case is yet another example of this sort of abuse of process.

Perhaps even more frustrating is the fact that in both *Hale* and *RadiOhio* the majority had declined to *designate* a hearing on the concentration issue pending resolution of Docket 18110, whereas in the instant case a hearing on this issue was not only designated, but it was, at least in theory, explored carefully by the Hearing Examiner and the staff before the majority decided to engage in its now infamous "shell game." Thus, the instant case is distinguishable from *Hale* and *RadiOhio* at least in part because deference to our rulemaking in those

cases was, among other things, arguably a means of employing scarce man-power resources in what some might term an intelligent fashion. In the instant case, those resources have already been expended. The "shell game" has only resulted in waste.

Despite its eagerness to rely on its "shell game" as a means of avoiding the resolution of the instant concentration question—a question which, I emphasize, was designated for hearing prior to the initiation of the further notice of proposed rulemaking in Docket 18110 and which, for that reason alone, should demand our immediate attention—the majority admits that it will examine such questions if there is substantial evidence that the licensee's concentration of media control is "extreme" or has resulted in abusive, anticompetitive conduct. *See, e.g., Michiana Telecasting Corp.*, 26 F.C.C. 2d 21 (1970). Without even attempting to define these terms, the majority then simply decrees that Chronicle's concentration of control is neither extreme nor productive of anti-competitive practices.

In order to determine whether Chronicle's concentration meets the majority's undefined "extreme" standard, it is first necessary to define the relevant geographic market.

The majority asserts, without any authority, that the relevant market is KRON's grade B contour, and that the communities within this contour are served by several television stations, AM and FM stations as well as by at least 29 daily newspapers. Even given this overly-expansive market definition, the staff concluded that about 10% of the population was exposed exclusively to media services owned by Chronicle. Apparently, even this significant percentage does not meet the majority's non-standard of "extreme," concentration, but the more important point is that the majority did not correctly define the relevant market.

In *Frontier Broadcasting Co.*, 21 F.C.C. 2d 570 (1970), the Commission designated a hearing on the licensee's renewal application (as in the instant case, prior to the initiation of the further notice of proposed rulemaking in Docket 18110) to determine whether Frontier had amassed an undue concentration of media control in the Cheyenne, Wyoming market.[3] The licensee held the license to Cheyenne's only TV station, one of Cheyenne's four AM stations and one of Cheyenne's two FM's. Frontier also owned the community's only newspaper, and had acquired a non-exclusive franchise for a cable system which would serve the same community.

Frontier argued that the relevant market (for purposes of determining whether these ownership patterns were unduly concentrated) was the market covered by the TV station's grade B contour. That contour, said the licensee, extended into areas which were also served by Denver, Colorado stations, as well as Denver newspapers. But the majority, agreeing with the arguments in a brief filed by the Justice

[3] Interestingly, Frontier argued that the Commission should not consider the concentration issue on an *ad hoc* basis but should wait until resolution of the proceeding in Docket 18110. That Docket had not yet been specifically expanded to encompass consideration of the newspaper-cross-ownership problem. But, in any event, the Commission, obviously aware of its impending further notice, specifically declined to delay consideration of Frontier's concentration of media control until after the culmination of Docket 18110. In my view, that result cannot be reconciled with today's contrary conclusion.

Department, refused to so view the relevant market, defining it instead as the far more geographically limited area in and around Cheyenne.

Apart from this clear precedent, there are, moreover, strong policy reasons for defining the relevant market in a manner more limited than that adopted by the majority in the instant case. Underlying the Commission's alleged concerns about undue concentration of media control is the belief that common ownership of those means of communications which provide a given community with information about local issues is not likely to produce a diversity of views on such issues. Such diversity of views—and hence diversity of media-ownership—is valued because, as the courts have so often enunciated, our society is premised upon the proposition that truth will be more likely to emerge from vigorous debate than from adherence to a single source of information. *See, e.g.*, Judge Learned Hand's opinion in *U.S.* v. *Associated Press*, 52 F. Supp. 362, 372 (S.D.N.Y. 1943), *aff'd sub nom*, 326, U.S. 1 (1945).

While Chronicle's numerous media interests begin to encounter greater competition as one moves out of metropolitan San Francisco into the surrounding Bay area communities, the fact remains that a substantial (or, to use the majority's terminology, an "extreme") percentage of the media outlets designed to serve the local needs of those persons in San Francisco proper are owned by Chronicle. Thus, while the people in the nine-county Bay area may be exposed to some diversity of media views, those in San Francisco clearly are not.

In short, I believe that the relevant market in this case should be the metropolitan area of San Francisco, where Chronicle has an iron grip on the various sources of communication, and not the greater Bay area to which KRON–TV's grade B contour extends, and in which there are additional media services controlled by sources other than Chronicle.[4] For these additional media services are not designed to, and do not, serve the local needs of the people of metropolitan San Francisco, but, rather, are designed to serve their own local communities. In terms of what one student has called "local service potential," [5] then, those newspapers and radio and television stations whose primary service is to communities outside of San Francisco are simply not relevant to the San Francisco market. And it is within *that* market that Chronicle has "extreme" concentration of media control.

The majority, of course, struggles to apply the broadest possible market definition in the hopes of justifying the extremely tenuous conclusion that Chronicle's media empire is really not so powerful after all. But even assuming *arguendo* that the majority is correct in

[4] The majority, by so broadly defining the geographic market, fails to focus on the fact that the San Francisco public has little choice but to receive its local news and information from Chronicle's media outlets. In short, for this large segment of the population there are few alternatives to Chronicle's news sources. *See, e.g.*, the discussion in Mr. Justice Fortas' opinion in *U.S.* v. *Grinnell Corp.*, 384 U.S. 563, 585 (1966), for the problems inherent in a market approach such as that taken by the majority in circumstances such as these. While this approach obviously benefits the Chronicle corporation's interests, it simply ignores the interests of a very substantial number of people living within the boundaries of San Francisco.

[5] This term was used in a paper prepared by Douglas Woodlock for a seminar I taught at Georgetown law school in the fall of 1972. *Newspaper Ownership of Broadcast Facilities.* The paper is unpublished and is on file in my office.

concluding that Chronicle's control over the media in this area is not "extreme," the majority's conclusion that Chronicle's media concentration has not led to anticompetitive abuses is surely ridiculous.

First, complainants allege that the Chronicle Publishing Co. has engaged in anti-competitive practices through the imposition of unreasonably restrictive syndication contracts. Interestingly, the majority does not even refer to this charge in the text of its opinion.

Complainants argue that with respect to most of these syndication contracts, Chronicle has extended territorial exclusivity within the entire nine county Bay area. In other words, no other newspaper in that area may publish the syndicated columns for which Chronicle has contracted. Yet, by publishing only 10% of such columns, Chronicle has prevented readers of other newspapers in the Bay area from reading the remaining 90%.

Apart from the question whether such a practice can possibly serve the public interest is the more serious question whether Chronicle has employed this territorial exclusivity unlawfully to defeat the interests of potential competitors. Such contracts are not, of course *per se* violations of the Sherman Act, but they must be reasonably designed for a legitimate purpose—*e.g.*, copyright protection—and may only be as extensive in territorial scope as is necessary to protect that purpose. *See, e.g., U.S.* v. *Chicago Tribune-N.Y. News Syn., Inc.*, 309 F. Supp. 1301 (S. D. N.Y. 1970).

In my view, by extending its exclusive syndication rights to the entire Bay area while, at the same time, refusing to publish 90% of those syndicated columns for which it has contracted, Chronicle has at the very least illustrated a *prima facie* case of bad faith and has very possibly violated the anti-trust laws. It is difficult for Chronicle to argue—unblushingly at least—that such extensive territorial restrictions are necessary to protect the rights of those columnists whose columns Chronicle never intended to publish. The majority—as it does so often—resolves this thorny question by simply ignoring it.

Second, there is a serious question in my mind about whether Chronicle exhibited good faith in entering into its Joint Operating Agreement with its competing newspaper, the *Examiner*. That agreement was executed in 1964, at the same time the Justice Department was proceeding against a similar agreement in Tucson, Arizona. Chronicle argues that it did not indicate bad faith by executing this agreement in these circumstances because, despite advice of counsel (which argued against seeking Justice Department approval), Chronicle's president nevertheless wrote to the Justice Department seeking approval of the agreement. That letter, however, was written in 1965—after the agreement had become a *fait accompli;* and, in any event, the Justice Department advised Chronicle that the agreement might well be subject to attack at some future time.

The majority does not consider the question of Chronicle's bad faith in these circumstances. Rather, the majority simply notes that the Newspaper Preservation Act of 1970 grants retroactive protection to this Joint Operating Agreement and also precludes this or any other agency from penalizing the parties to that agreement. If this statute grants limited retroactive antitrust immunity to any company, it

grants it to Chronicle's agreement only if either Chronicle or Hearst (owner of the *Examiner*) had been in sufficient financial straits to meet the Act's requirement that all but one newspaper to an agreement of this sort be in serious financial difficulty.

It is not clear to me that the Hearing Examiner made such a finding with regard to either of these newspapers. But perhaps the more important point is that, at the time this agreement was reached, there was no Newspaper Preservation Act, and Chronicle's conduct was certainly designed for purposes which must be viewed as anticompetitive and which, at the time, were almost surely illegal. *See Citizens Publishing Co.* v. *U.S.*, 394 U.S. 131 (1969). Though the statute would appear to preclude the FCC from attempting to interfere with this agreement (provided it meets the statutory test regarding financial difficulty), the statute does *not* prevent us from considering Chronicle's apparent bad faith in entering into this agreement.

When viewed together, then, Chronicle's joint operating agreement and its territorially exclusive syndication contracts, if not illegal, at least suggest that Chronicle was attempting to utilize its powerful media control in the San Francisco market for purposes antithetical to the public interest. Under § 309 of the Communications Act of 1934, the FCC has no choice but to deny a renewal application where the licensee's conduct, even if not illegal, fails to serve the public interest. This, in my view, is definitely that case.

### II. NEWS MANAGEMENT

Complainants contend that the Chronicle Broadcasting Co. manipulated KRON–TV's news and public affairs coverage in an effort to enhance and further Chronicle's CATV and newspaper interests. In essence, these allegations suggest further abuses arising from Chronicle's already ample media holdings in the San Francisco area. In our order designating this issue for hearing, we placed the burden of introducing evidence on the complainants but put the ultimate burden of proof on the licensee.

Complainant Kihn was employed at KRON–TV for several years as a cameraman. He explained that he became disillusioned with KRON's alleged policy of manipulating news and public affairs coverage of numerous events in an apparent effort to enhance Chronicle's CATV and newspaper interests. Such disillusionment led Kihn to compile a diary of abuses. Several instances of such alleged manipulation were reviewed during the hearing, and I deal here only with some of the more egregious examples, examples which, in turn, received equally egregious "resolution" by both the staff and the majority.

First, complainants alleged that KRON–TV engaged in numerous activities designed to encourage local communities to grant Chronicle's pending applications for CATV franchises.

Robert Anderson, a KRON writer assigned to do a documentary dealing with Vallejo, California (where Chronicle was seeking a franchise) testified that when he suggested an exposé of that community's political factionalism, Harold P. See, one of Chronicle's

officers and directors, told him to kill the story in order not to jeopardize Chronicle's franchise application.

See, of course, denied the conversation. The Hearing Examiner found that Anderson was not attempting to falsify his testimony, though with the exception of See's allegedly extraordinary remarks, Anderson's memory of the events regarding the documentary was vague. The staff appears to hold Anderson's "dim" memory against him. Personally, I can see no reason why Anderson should have recalled any of the detailed events surrounding the Vallejo project except for any events which might have appeared bizarre. See's alleged admonishments were surely bizarre, and it does not seem at all surprising that those remarks are the ones Anderson recalled.

The Hearing Examiner concluded that the evidence was inconclusive. He then chose, for reasons which remain unclear, to believe See's denial. The majority is eager to agree.

On another occasion, when KRON produced a one-half hour program on the San Carlos "Chicken Ball" (Chronicle also had a pending CATV application in San Carlos), a KRON cameraman testified that he heard KRON's news director tell the assignment editor (in the presence of one of Chronicle's corporate directors) that the extensive KRON coverage was due to the pending CATV franchise. The majority does not argue that this and similar statements were never made; rather, the majority argues that they were made only by lower or middle management officials, not by major Chronicle officials.

There is also evidence that with respect to South San Francisco (where Chronicle also had a CATV application pending), See ordered KRON's news director to cover a story in that community in order to improve Chronicle's CATV chances. Kihn produced a copy of a memo from the news director to this effect, but, not surprisingly, the original of that memo no longer appears in KRON's files. See denies having so instructed his news director, though See admits that when the completed film was accidentally destroyed, See did write the mayor of South San Francisco apologizing and urging him not to hold the film's loss against Chronicle's pending CATV application.

Amazingly, the staff and majority conclude that "a finding that CATV interests affected KRON's programming is not warranted."

Complainants also allege that KRON manipulated certain news stories in order to foster Chronicle's newspaper interests. For example, complainants allege that KRON refused to broadcast news of the Chronicle-Examiner joint agreement and that KRON also refused to broadcast news of a threatened Teamsters Union strike against San Francisco's newspapers.

Kihn alleges further that he was ordered by a fellow reporter to avoid extensive coverage of events occurring during a prolonged strike against the Chronicle newspaper. The staff concluded, without either explanation or supportive testimony, that Kihn and the reporter had "had a simple disagreement on the value" of the story.

In response to evidence of various memoranda from See and the KRON news director concerning the need for Chronicle's media sources to maintain a good public image regarding Chronicle's media

interests, the staff simply asserted, without any apparent basis, that See was concerned only with news accuracy.

There are, of course, many other allegations of news manipulation and an equal number of facile FCC responses. What emerges from these responses is the rather disturbing realization that no matter what the allegation, no matter what the evidence, no matter how clear the proof, complainants never had a chance. Aside from simply refusing to believe complainants' allegations, and aside from finding flimsy justifications for very damaging documents, the majority has employed two primary tools to defeat complainants' case against KRON.

First, the majority asserts that wherever the facts are so clear that incriminating manipulative conduct by various middle-management personnel cannot simply be disregarded, such conduct will not be held against the Chronicle corporation. Aside from raising the question whether news manipulation by middle-management personnel somehow serves the public interest better than manipulation that is personally supervised by the corporate president, the majority's approach makes it almost impossible for these and other complainants to call corporate activities into serious question.

It is the rare case, indeed, where a member of the public—or even a station's cameraman—will be able to trace back orders from middle-management to the corporation's highest officials. The majority, by requiring that the corporation's highest executives must be *proved* to have had knowledge of—and to have condoned—middle-management conduct, erects an impenetrable shield around the corporate vehicle. The majority has recently expressed its preference for corporate—as opposed to individual—illegality, *see Teleprompter Cable Systems*, —— F.C.C. —— (1973), and so it simply extends that philosophy in this case.

But even assuming *arguendo* that the majority is correct in its holding that Chronicle's highest officials neither knew about nor approved the conduct of KRON's middle-management, the majority would seem to have established a *prima facie* case that Chronicle's highest officials simply abdicated their role as corporate supervisors. The majority, of course, denies that complainants have established such a case of faulty supervision, but the majority does not even stop to ponder that it has done so itself.

In those cases where certain of Chronicle's higher management officials *were* allegedly linked to the various events of alleged news manipulation, both the staff and the majority conclude that the complainants failed to carry their burden of proof with regard to the motives of such high officials. But, as we stated in our designation order, the ultimate burden of proof in this area was properly placed on the licensee because the facts surrounding Chronicle's conduct in this area were peculiarly within its knowledge.

The Hearing Examiner concluded, however, that complainants could not prevail on the news management issue absent "clear, convincing and unambiguous evidence" of the licensee's motives. Complainants suggest that such a standard requires that they prove KRON's motives beyond a reasonable doubt rather than by a preponderance of the evi-

dence and that such a proof requirement reverses the burdens as determined in our designation order.

Complainants are surely correct, but both the staff and the majority attempt to support the Examiner's conclusions through reliance on our decision in *Hunger in America*, 20 F.C.C. 2d 143 (1969), where the Commission held that examples of alleged news management cannot be established absent evidence extrinsic to the actual contested programming content. And, indeed, if a complaint of news management were to rely solely upon program content, the Commission would encounter substantial First Amendment problems if it did not demand such extrinsic evidence.

But the point in the instant case is that complainants *have* produced "extrinsic evidence," indeed voluminous extrinsic evidence, to establish KRON's rather insidious motives for the various programming practices documented in the petition to deny. Such evidence is not only extrinsic to program content but, though it includes "speech" to the extent that it involves conversations and management orders, it is surely not subject to First Amendment protections. Such conversations were clandestine. They were surely not designed to encourage debate on public issues. Further, those words which were introduced as evidence were the sort of speech encountered in conspiracy cases where X orders Y to "take care of" Z. What the majority holds, in effect, is that even if it is clear that X so directed Y, principles of free speech somehow demand that X's motives be established by proof beyond a reasonable doubt. This, I think, is absurd.

Like the majority's approach to the middle-management problem, the majority's imposition of such an impossible and unreasonable burden of proof not only illustrates the sort of typical FCC "curious neutrality in favor of the licensee" prohibited by the court in *Office of Communications of United Church of Christ v. FCC*, 425 F. 2d 543 (D.C. Cir. 1969), but it also reveals the extent to which this Commission will go to free a corporation from the implications of its own conduct.

In the instant case, complainants Kihn and Streeter have established substantial evidence of abusive conduct by the Chronicle Broadcasting Co., conduct which cannot possibly be in the public interest. Complainants documentation of the alleged incidents of news management and manipulation are extensive and, in my view, terribly convincing and devastating. But the majority—in a manner very similar to that employed by various White House officials confronted with similarly damning charges with regard to corrupt practices—squirms, twitches, and fidgets to avoid the truth, truth which can only lead the FCC to deny Chronicle's renewal applications.

Though the majority attempts to argue that complainants have failed to make out a particularly powerful case against Chronicle, it is obvious that the licensee was of a decidedly different view. For, once confronted with this petition to deny and the accompanying factual allegations which Chronicle recognized as terribly serious, the licensee did the only thing it thought adequate to head off the complainants' charge: it attempted to harass and intimidate Kihn and Streeter.

### III. THE INVESTIGATION

Upon learning that complainants had filed a petition to deny Chronicle's license renewal applications, the licensee employed a private firm to investigate Kihn. See contended that this investigation was conducted solely to determine whether Kihn was leading disgruntled KRON employees in some form of concerted conduct against the licensee.

The investigators gave false names to various records custodians in order to prevent Kihn from learning of the investigation. The investigators followed Kihn by automobile and interviewed his neighbors. Kihn only discovered that he was being investigated when he noticed a car was following him after a malfunction in the investigators' two-way radio system.

Upon being discovered, the investigation was temporarily discontinued. But, after a hearing had been designated in this case, KRON had the stupidity, brazen confidence in the FCC, and gall to continue the invasion of Kihn's privacy. But, the Hearing Examiner had even more gall when he concluded that under the circumstances, it would have been imprudent for KRON to have declined to engage in such an investigation. One could, I suppose, say the same thing about General Motors' investigation of Ralph Nader, or the Republicans' "investigation" of the Democratic National Committee.

The staff found solace in the fact that the investigation was "discreet." Apparently, had the investigators been total buffoons, physically thrusting themselves awkwardly into Kihn's path, the staff might have been concerned. But, no doubt, were the latter the case, the staff would simply note that nobody can really be harassed or intimidated by such incompetence.

Like the staff before it, the majority holds that the investigation does not reflect badly upon KRON and does not suggest that Chronicle is unqualified to hold broadcast licenses. And this despite the fact that this investigation was almost certainly a violation of Kihn's rights to privacy. *See, e.g., Nader v. General Motors Corp.*, 25 N.Y. 2d 560, 255 N.E. 2d 765 (1970), which case has been expressly followed by the California court in which complainant Kihn has brought a civil action against the investigative firm.

In effect, the majority asserts—and this is surely a most astounding comment, even in an opinion loaded with astounding comments—that the fact that Chronicle may have violated the law does not mean that it has violated the public interest.[6] I had always thought that one is entitled to presume that conduct prohibited by law is not in the public interest. The majority, however, takes a decidedly more libertarian view—at least when the interests of large corporations are at stake.

[6] Oddly enough, with respect to the Joint Operating Agreement, the majority appears to conclude that since that agreement does not violate the law, it cannot be a violation of the public interest. While I have substantial problems with the majority's analysis of the joint operating agreement, the majority's own reasoning would seem to suggest that if a licensee *does* violate the law, he has probably violated the public interest as well. The majority asserts, however, that the "short answer" to complainants' contention to this effect is that violations of California law by Chronicle have no relevance to the question whether Chronicle is a qualified licensee. The short answer to the majority's "short answer" is unprintable, even in the FCC official reports.

The majority concludes further that this investigation was not designed to harass or intimidate Kihn or Streeter. What, then, was the purpose of this covert attempt to pry into complainants' private lives? Why, in short, did Chronicle investigate complainants' marital affairs if not in an attempt to uncover damning and intimidating evidence?

The majority concludes, mercifully, with the assertion that since these investigations obviously did not divert complainants from the their attack on KRON's licenses, such investigations do not suggest that KRON's licenses should not be renewed. Perhaps this is the most remarkable conclusion of them all, for the point is not whether Kihn and Streeter were successfully intimidated (though Chronicle certainly tried its best); it is, rather, whether potential complainants against future renewal applications of different licensees will be made reluctant by today's approval of Chronicle's conduct. And I think there can be no question but that members of the public will think twice before initiating petitions to deny once they realize that such petitions could open them up to investigations of this type.

On at least one prior occasion the majority has expressed its disapproval of such intimidating tactics by licensees, *Fort Collins Broadcasting*, 38 F.C.C. 2d 707 (1972). But, as in that case and today's such admonishments are words and nothing more.[7]

And therein lies the tragedy of today's decision. Today the FCC majority has proved beyond a shadow of a doubt that the public must lose when it attempts to correct the grossest wrongs committed by the largest of America's communications corporations. The fact is that this entire license renewal proceeding has been a ritual—nothing more and nothing less. It has wasted countless amounts of time and effort. It has produced some incredible casuistry from those charged with finding the facts and enunciating the appropriate policy choices. But the result was preordained a long time ago. The long process of hearings and opinion-writing has added nothing of value either to the law or the public interest. The only addition has been paper.

I dissent.[8]

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[7] During the Commissioners' brief discussion of its opinion, the majority decided to add some concluding language disapproving the scope of the licensee's investigation of Kihn. Such disapproval, the majority assured, would not lead to denial of renewal but would serve as a "warning" to licensees not to conduct such investigations in the future. Similar cautionary language was added to the *Fort Collins* decision when it was discussed late last year. The sad fact is that such admonishments are words but nothing more, for no licensee could have believed, prior to the issuance of the majority's opinion in today's case, that an investigation of the sort engaged in here could serve either the public interest or the FCC's processes.

[8] By my participation in this case, I obviously concur, without comment, in the majority's disposition of the disqualification issue in this case.

F.C.C. 71D-6

BEFORE THE

## FEDERAL COMMUNICATIONS COMMISSION

WASHINGTON, D.C. 20554

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| In Re Applications of CHRONICLE BROADCASTING CO., SAN FRANCISCO, CALIF. For Renewal of Licenses of Station KRON-FM, Station KRON-TV, San Francisco, Calif. | Docket No. 18500 File No. BRH-926 File No. BRCT-94 |

APPEARANCES

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INITIAL DECISION OF HEARING EXAMINER CHESTER F. NAUMOWICZ, JR.

(Issued February 22, 1971; Released March 1, 1971)

PRELIMINARY STATEMENT

1. By order released March 20, 1969, the Commission designated the above-captioned renewal applications for hearing on the following issues: [1]

"1. Whether Chronicle Publishing Company, the parent of the licensee, has an undue concentration of control of the media of mass communications in the San Francisco Bay area;

[1] On April 23, 1969, the Commission released a Specification Order detailing certain areas of interest under each of the issues. Initially, the Examiner treated the Specification Order as delimiting the scope of the designated issues. However, by order released October 17, 1969 (reaffirmed by order released May 26, 1970), the Commission explained that "the items mentioned in the Specification Order were not meant to define the limits of the record; the issues perform that function". Hence, since the Specification Order does not serve the purpose of defining the area of inquiry, no useful purpose would be served by quoting or summarizing its provisions.



109-038—73——5

"2. Whether the Chronicle Publishing Company has engaged in anti-competitive or monopolistic practices in the newspaper field in the San Francisco Bay area;

"3. Whether the licensee has used the facilities of Stations KRON–FM and KRON–TV to 'manage' or slant the news and public affairs for the purpose of advancing the interests of the Chronicle Publishing Company;

"6.[2] Whether, in the light of the evidence adduced pursuant to the foregoing issues, a grant of the above-captioned applications would serve the public interest, convenience, and necessity."

By orders released June 5 and August 13, 1969, the Review Board enlarged the issues as follows:

"4.[2] Whether the past programming of Stations KRON–FM and KRON–TV, particularly with regard to public service programming was of such high quality as to constitute a countervailing factor in the resolution of this case insofar as it relates to Issues (2) and (3), above.

"5.[3] (a) To determine the facts and circumstances relating to and surrounding the investigation of Albert Kihn and Blanche Streeter by Chronicle Broadcasting Co.;

(b) To determine whether the conduct of such investigations constituted attempts to harass, coerce, and intimidate such persons and, if so, what effect such conduct has upon the qualifications of Chronicle Broadcasting Co. to be a Commission licensee."

2. The applicant published notice of the hearing and notified the Commission thereof pursuant to the governing statute and rules. Prehearing conferences were held at various dates between May 19, 1969 and March 13, 1970. Hearings were conducted between March 17 and April 29, 1970; and between September 14 and September 18, 1970. The record was closed on September 18, 1970. The filing of proposed and reply findings of fact was concluded by February 2, 1971.

## FINDINGS OF FACT

*Issue No. 1: Concentration of Control*

3. Stations KRON–TV and FM are owned by Chronicle Broadcasting Co., a wholly owned subsidiary of The Chronicle Publishing Company. The Publishing Company, which owns the San Francisco Chronicle,[3] is closely held for the benefit of the descendents of Mr. M. H. deYoung. Chronicle also holds CATV interests in the area as noted at para. 9, *infra*.

*KRON–FM*

4. KRON–FM's 1.0 mv/m contour extends between 44 and 54 overland miles in various directions, and covers 3,469,406 persons.[4] The signal extends over all of San Francisco and San Mateo counties; most of Marin, Contra Costa and Alameda counties; and lesser portions of Santa Clara, Solano, Napa, Sonoma and Santa Cruz counties. Two commercial and one educational FM stations furnish 1.0 mv/m coverage throughout this area, and more than 30 FM stations serve parts of the area. All but 4,183 of the persons served by KRON–FM receive 1

[2] For convenience, the various issues have been renumbered, and assigned the numbers by which they were referred to throughout the hearing.

[3] The Chronicle is a morning daily, and, as noted at para. 40(e), *infra*, is also part of a Sunday combined publication.

[4] Unless otherwise noted, all population figures recited in this Initial Decision are based on the 1960 census.

mv/m coverage from ten or more FM stations (over 3,150,000 persons are served by 20 or more such stations). The remaining 4,183 persons, residing some 40 miles north of San Francisco, receive from four to nine FM 1 mv/m signals augmented by at least 20 AM signals daytime and 9 AM signals at night.[5]

*KRON–TV*

5. KRON–TV's Grade A contour extends some 40–45 miles from San Francisco, and covers 3,268,000 persons. All these people are within the Grade A contours of at least seven other television stations,[6] and 2,475,928 of them receive ten or more Grade A signals.

6. The station's Grade B contour extends some 70–80 miles from San Francisco, and covers 4,135,977 persons. All of these people receive at last one other Grade B signal; all but 1,001 receive at least two such signals; all but an additional 839 persons receive at least three other Grade B signals; all but an additional 8,172 persons receive a minimum of four other Grade B signals, and all but an additional 3,235 persons receive at least five other Grade B signals. At least 21 AM primary services daytime and three such services nighttime are available throughout the KRON Grade B service area.

7. The Chronicle enjoys wide circulation throughout nine counties which make up what is generally known as the "Bay Area": Alameda, Contra Costa, Marin, San Francisco, San Mateo, Napa, Santa Clara, Solano and Sonoma. Approximately three-quarters of its circulation is concentrated in these counties. In addition it solicits and/or sells local advertising in Sacramento, Lake, San Joaquin, Monterey and Sonora counties.[7]

8. Twenty-nine daily newspapers of general circulation are published in the nine county "Bay Area". Only two of these are published in San Francisco itself, the Chronicle (477,009) and the Examiner (204,749). Many of the others have relatively limited circulations, but several are widely read in the area: Oakland Tribune (217,500); San Jose Mercury (128,000); Walnut Creek Contra Costa Times (80,000); Santa Rosa Press Democrat (45,500); Palo Alto Times (45,000); San Jose News (76,250); San Mateo Times (45,000); San Rafael Independent Journal (44,500); *et al.* Although these non-local papers penetrate less than 5% of the market in San Francisco proper, their combined total circulations exceed the combined total circulations of the San Francisco papers. In the counties in which the papers compete, the non-San Francisco papers tend to achieve greater household penetration than do the San Francisco papers. In addition, numerous other publications are available in the area including non-daily local newspapers; non-local daily newspapers such as the west coast edition of the Wall Street Journal (35,000), the New York Times (7,500) and the Christian Science Monitor (15,000); and a total of 34 national

[5] At no point in KRON–FM's 1 mv/m contour are fewer than 20 AM primary signals available daytime or five at night.

[6] One educational and four commercial stations in San Francisco provide Grade A service throughout KRON–TV's Grade A contour.

[7] KRON–TV's Grade B contour encompasses all of the nine county "Bay Area" except small portions of Napa, Santa Clara and Sonoma Counties containing 14,417 persons. It also covers most of San Joaquin County, and lesser portions of Lake, Monterey and Sacramento Counties. In addition all or part of Santa Cruz, Stanislaus, San Benito and Yolo Counties are covered.

magazines having circulations in excess of 30,000 in the San Francisco ADI.[8]

9. Chronicle owns Western Communications, Inc., a CATV management company. Western Communications, in turn, owns County TV Cable, State Cable and Western TV Cable, and 80% of Concord TV Cable. Within KRON–TV's Grade B contour: County TV Cable operates a CATV system in San Mateo county with 1,420 subscribers; Western TV Cable owns a system in South San Francisco with 7,855 subscribers (it also has a franchise for San Francisco which it does not propose to employ); and Concord TV Cable operates a system in and around Concord in Contra Costa county with 15,964 subscribers. State TV Cable operates a system at Chico, California outside KRON–TV's Grade B contour. Chronicle's combined 25,239 CATV subscribers within the KRON Grade B contour represents 13.5% of the 187,180 CATV users within that contour.

10. In an effort to demonstrate patterns of media usage in the pertinent area, Chronicle commissioned a survey. The study was designed by individuals professionally competent to undertake such work, and the end product is entitled to evidentiary weight. Between November 3 and November 16, 1969, a total of 1,617 persons were interviewed. They were residents in a 12-county area wherein lie 95.8% of the households within KRON's Grade B contour and within which the Chronicle has circulation and sells local advertising. The interviews were evenly spaced over the 14 days of the survey, and were personally conducted in randomly selected homes throughout the area.

11. The survey disclosed that on the average day 77% of the adults watched TV, 79% read newspapers,[9] 59.9% listened to AM radio, 19.6% listened to FM radio, and 52.9% read magazines. The average media intake was 5.89 hours: television, 2.75 hours; radio, 1.99 hours; newspaper reading, 0.67 hours; and magazine reading, 0.48 hours. News exposure was 57.4% for metropolitan papers, 32.7% for local dailys, 52.5% for television, 45.8% for AM, 11.4% for FM, and 9.6% for news magazines. The three network affiliates had similar audience shares of the average daily audience: KPIX, 37.1%; KRON, 36.8%; and KGO 33.3%. The Chronicle had an average daily readership of 23.4%, followed by the Oakland Tribune with 13%, the San Francisco Examiner with 11.7%, and the San Jose Mercury with 10.5%.[10] KRON–FM had an exposure level of 0.1%, which was exceeded by six FM stations.

12. Among those who viewed KRON:

(a) 24.5% read the Chronicle the previous day; 14.1% read the San Jose Mercury; 14% read the San Francisco Examiner; and 13.4% read the Oakland Tribune.[10]

(b) 34.6% read the Chronicle during the past week; 20.1% read the Examiner; 10.4% read the Tribune; 18% read the Sunday Examiner and Chronicle; and 17.5% read the Mercury.

[8] The Area of Dominant Influence (ADI) consists of those counties in which the home-market television stations receive a preponderance of the total viewing hours.

[9] 57% of the total read at least one metropolitan paper and 33% read at least one local paper.

[10] These percentage figures may be unintentionally deceiving. The universe of which they are a fraction is determined by the characteristics of the Chronicle media. It is to be suspected that outlets identified with Oakland, San Jose or other communities command greater percentages of the audience within their own cities and lesser in other portions of the statistical universe. Nevertheless, the gross figures do tend to demonstrate the extent to which other outlets collectively command attention throughout the area.

(c) 38.7% read the Chronicle in the past month; 21.7% read the Examiner; 21.3% read the Tribune; 19.2% read the Sunday Examiner and Chronicle; and 19% read the Mercury.

(d) A mean number of 2.44 TV stations were viewed the previous day; 51.1% watched KPIX; 41.0% watched KGO; and 22.1% viewed KTVU, Oakland.

(e) 45.6% watched KRON for news; 27.1% of them also viewed KPIX for news; and 15.8% viewed KGO for news. The mean time viewing news was 0.79 hours: 0.40 on KRON; 0.20 on KPIX; and 0.13 on KGO.

(f) 61% listened to one or more AM stations, with a mean average of 0.31 hours devoted to AM news.

(g) 16.3% listened to one or more FM stations, with a mean average of 0.04 hours devoted to FM news.

(h) 53% read at least one magazine that day, the mean number of magazines having been read being 0.94 and the mean time devoted thereto being 0.45 hours.

13. Among those reading the Chronicle:

(a) 70.3% viewed one or more TV stations the previous day with the mean number of stations viewed being 1.52. 44.4% viewed KPIX; 35.5% viewed KRON; 32.1% viewed KGO; and 13.3% watched KTVU.

(b) A mean of 0.59 hours was spent watching TV news. 24.3% watched KPIX for a mean 0.23 hours; 19.2% viewed KRON for a mean 0.13 hours; and 13.0% viewed KGO news for a mean 0.14 hours.

(c) 60.2% listened to AM stations, with a mean of 0.38 hours being devoted to AM news.

(d) 34.8% listened to FM stations the previous day with a mean of 0.07 hours being devoted to FM news.

(e) 0.62 mean hours were devoted to reading a mean of 1.30 magazines.

14. Of the total study group 51.2% were exposed to KRON or Chronicle, with the percentage being 40.6 for news exposure. Nine percent of the total group were exposed to both outlets, 4.2% in their news capacity.

15. From the time the Chronicle stations went on the air [11] until September 1967 they were housed in the same building as the newspaper operation. This physical proximity plus close corporate identity [12] led to the regular utilization by the stations of the newspaper's news facilities. Thus, KRON–TV had constant immediate access to the "dupes" of Chronicle news stories, and they were regularly utilized as sources or suppplements of the stations' news programming. It was also the practice of the television newsroom to consult the newspaper's files for a list of the next day's scheduled news events.

16. However, the station's policy, at least by the fall of 1964, was to rewrite the stories obtained from the newspapers. On November 6, 1964, KRON–TV President, Harold P. See, wrote a memo limiting the use of Chronicle stories except as a source and forbidding verbatim quotation of such stories.

17. Further separation was achieved with the move of the stations in September, 1967 to a new building separate from the newspaper. By the fall of 1968 KRON–TV no longer had access to the Chronicle "dupes" or photo library, and there was no direct phone connection between them. The staffs of the two operations have become entirely separate, and no one connected with the day-to-day operation of the

[11] KRON–FM in 1947, the television station in 1949.

[12] Until early 1966 both stations were operated as divisions of the Chronicle Publishing Company. At that time their licenses were assigned to Chronicle Broadcasting Co., a wholly owned subsidiary of Chronicle Publishing Co.

one has any connection with the other.[13] There are no joint advertising rates, and the two do not have a reciprocal advertising arrangement although each has such arrangements with local AM stations.[14]

18. A study was conducted to ascertain whether columns of the TV critic of the Chronicle are used to promote the programming of KRON. The TV columns of the Chronicle, Examiner and Tribune for each of the days in the Commission's composite weeks for the last three year license period were examined. Comparison was made of references to stations by column inches, by mentions, and by program recommendation. KRON ranked second on both mentions and inches in the Chronicle. It was ranked first on both criteria in the Tribune and second on both in the Examiner. However, the Examiner columnist devoted both more mentions and more inches to KRON than did the Chronicle columnist. Most of the mentions of KRON programs in Chronicle were favorable rather than unfavorable, but the same columnist made similar recommendations for the other local stations.

19. Neither the TV nor the FM station made a practice of editorializing during the last license renewal period. Hence, no findings can be formulated as to any correlation between their editorial positions and those of other Chronicle-related outlets.[15]

20. At the highest corporate levels there are common personnel among certain of the Chronicle interests, and a few employees have media connections outside the Chronicle sphere. In addition, Chronicle Broadcasting handles the accounting for the CATV companies. Thus: (a) Charles deYoung Thieriot, Chairman of the Chronicle Broadcasting Co. board, is also President and director of Chronicle Publishing Co., editor and publisher of the Chronicle, Chairman of the board of Western Communications (para. 9, *supra*), and a director of the San Francisco Newspaper Printing Co., Inc., a corporation owned equally by Chronicle Publishing and the Hearst Corporation (paragraph 40, *infra*); (b) Harold P. See is President and director of Chronicle Broadcasting; President and director of Western Communications, Inc.; and Chairman of the board and director of all of Chronicle's CATV operating companies[16]; (c) Aldo H. Constant is Vice President and director of Chronicle Broadcasting, and in the past has served as Vice President and director of Concord TV Cable and Western TV Cable; (d) Robert M. Raymer is Secretary and director of Chronicle Broadcasting, County TV Cable, State TV Cable, and Western TV Cable, and Secretary of Western Communications, Inc. and Concord TV Cable; (e) L. A. Denny is Treasurer and director and John R. Kaufmann is the Assistant Treasurer of Chronicle Broadcasting, Western Communications, Concord, County, State, and Western TV.

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[13] Both operations use the same law and accounting firms, and certain individuals serve on both corporate boards, see paragraph 20, *infra*.

[14] KRON–TV advertises in Chronicle at regular rates, but Chronicle does not advertise on KRON–TV.

[15] The sole exception was a May, 1968 editorial in favor of a bond issue to beautify Market Street. Although the Chronicle took a similar position, this single instance is regarded as insufficient base for any meaningful finding.

[16] When the broadcast stations were operated as divisions of Chronicle Publishing, Mr. See was also a Vice President of that company.

21. Among KRON employees: a sports announcer works at radio station KNBR as a disc jockey; and two producers write for magazines. Some other announcers and directors free-lance as talent. One KRON reporter formally was employed by the Chronicle in that capacity, and a former announcer independently contracted feature material which was published in the Chronicle.

22. As heretofore noted, the broadcasting stations were at one time quartered in the Chronicle building. In addition, Western Communications, Inc. occupied space in that building from September 1967 to April 1969. The newspaper's press relay radio transmitting antenna is mounted on KRON–TV's antenna tower. Other than this, there is no sharing of physical facilities.

23. In 1968 Chronicle's 200 largest advertisers accounted for 35.3% of the paper's gross advertising revenues, the top 25 contributing 19.3%. During the same year KRON–TV had a total of 375 advertisers who paid in excess of $1,000. Collectively, these advertisers accounted for 87.5% of the station's gross revenue, and the top 25 of them represented 33.7% of gross advertising revenue.

24. Of KRON–TV's top nine advertisers, none are among Chronicle's top 200, nor are KRON's fourteenth, sixteenth through nineteenth, twenty-first, twenty-second, or twenty-fifth. KRON's tenth advertiser ranks fifty-second with Chronicle; its eleventh, fourteenth; its twelfth, twentieth; and its thirteenth, nineteenth. KRON's fifteenth largest advertiser is General Motors, the individual automobiles of which rank twelfth, forty-eighth, eighty-fourth, ninety-second and one hundred thirteenth among Chronicle advertisers. KRON's twentieth advertiser is Chronicle's twenty-third; its twenty-third, thirty-ninth; and its twenty-fourth, one hundred seventeenth.

25. The record contains figures as to KRON's share of broadcast revenues in the area, and estimates [17] as to the Chronicle/KRON share of total area advertising revenues. The estimates indicate that KRON–TV [18] earns between 2.56% and 2.80% of the total advertising revenues in its Grade B area; between 2.80% and 3.10% in the San Francisco ADI; and between 2.43% and 2.82% in the San Francisco/Oakland SMSA. The Chronicle's share of total advertising revenues in the KRON Grade B area is between 4.77 and 5.22%; between 4.23% and 4.68% in the San Francisco ADI; and between 4.64% and 5.36% in the San Francisco SMSA. Thus, the Chronicle/KRON totals are between 7.34% and 8.02% in the Grade B area; between 7.03% and 7.79% in the San Francisco ADI; and between 7.07% and 8.18% in the San Francisco/Oakland SMSA. If the revenues earned by the San Francisco Examiner are added,[19] the totals rise to between: 12.11% and 13.24% in the Grade B area; between 11.87% and 13.15%

[17] The estimates are based on actual KRON/Chronicle revenues compared to the estimated total advertising expenditures compiled by McCann-Erickson, Inc. and contained in "Statistical Abstract of the United States", U.S. Department of Commerce, Bureau of the Census. Thus, it should be kept in mind that, although the quoted percentages give the appearance of great accuracy because they are stated in terms of hundredths of a percent, they are actually based in part on estimates, and the results can be regarded as useful only insofar as they indicate approximations or trends.

[18] KRON–FM earns no advertising revenues.

[19] The nature of the connection between the Chronicle interests and the Examiner is detailed at paragraph 40, *infra*.

in the San Francisco ADI; and between 12.71% and 14.70% in the San Francisco/Oakland SMSA.

26. In terms of broadcast revenues and incomes in the San Francisco-Oakland market over the decade preceding the hearing, the figures were as follows:

| | Revenues | Income |
|---|---|---|
| 1960: | | |
| TV total | $17,160,853 | $5,687,399 |
| KRON-TV | 5,146,409 | 2,420,496 |
| Broadcasting total | 26,991,891 | 5,217,088 |
| KRON total | [20] 5,147,223 | 2,405,845 |
| 1961: | | |
| TV total | 18,062,683 | 6,399,513 |
| KRON-TV | 5,262,048 | 2,638,199 |
| Broadcasting total | 27,502,481 | 5,375,502 |
| KRON total | 5,262,335 | 2,622,243 |
| 1962: | | |
| TV total | 22,301,270 | 9,103,484 |
| KRON-TV | 6,361,573 | 3,443,884 |
| Broadcasting total | 34,371,149 | 9,327,371 |
| KRON total | 6,362,156 | 3,426,859 |
| 1963: | | |
| TV total | 25,361,643 | 11,155,983 |
| KRON-TV | 6,697,079 | 3,749,913 |
| Broadcasting total | 38,041,748 | 11,389,481 |
| KRON total | 6,697,090 | 3,731,562 |
| 1964: | | |
| TV total | 30,796,394 | 14,795,944 |
| KRON-TV | 7,779,457 | 4,482,633 |
| Broadcasting total | 44,587,734 | 15,228,723 |
| KRON total | 7,779,667 | 4,461,677 |
| 1965: | | |
| TV total | 35,284,488 | 18,371,497 |
| KRON-TV | 9,425,012 | 5,866,714 |
| Broadcasting total | 50,308,932 | 18,707,285 |
| KRON total | 9,425,372 | 5,846,929 |
| 1966: | | |
| TV total | 41,501,957 | 21,648,795 |
| KRON-TV | 10,512,304 | 6,633,559 |
| Broadcasting total | 58,715,590 | 23,010,362 |
| KRON total | 10,512,304 | 6,618,639 |
| 1967: | | |
| TV total | 41,338,355 | 18,620,868 |
| KRON-TV | 9,595,554 | 4,631,734 |
| Broadcasting total | 60,153,015 | 19,585,954 |
| KRON total | 9,595,554 | 4,616,420 |
| 1968: | | |
| TV total | 48,582,010 | 17,326,733 |
| KRON-TV | 12,107,149 | 6,021,943 |
| Broadcasting total | 70,200,193 | 19,710,435 |
| KRON total | 12,107,149 | 5,998,017 |
| 1969: | | |
| TV total | 52,423,454 | 17,134,536 |
| KRON-TV | 12,894,607 | 5,567,765 |
| Broadcasting total | 74,171,104 | 18,890,384 |
| KRON total | 12,894,607 | 5,537,977 |

[20] Between 1960-65 KRON-FM revenues never reached $1,000 in any year. From 1966 on the station has had no revenues. Expenses for the station have run in the $15,000-25,000 annual range.

*Issue No. 2: Anti-Competitive Practices*

27. In 1959, and for many years prior thereto, there were four daily newspapers published in San Francisco and circulated throughout the bay area: the Chronicle and the Examiner (Hearst) morning and Sunday; and the News (Scripps-Howard) and Call Bulletin (Hearst) in the evening. All except the Examiner, which was the circulation leader, had been showing substantial losses for some time, and in 1958 the Examiner shifted to a loss position. In 1959, the afternoon

papers, both of which were losing advertising linage and facing increasing deficits, were combined into the News Call Bulletin and conducted as a joint venture. However, the combined paper continued to lose money, and in 1962 Scripps-Howard sold its interest to Hearst. Nevertheless, from 1960 to 1964 all of the San Francisco daily papers operated at a loss.

28. During the period of 1954–64 the financial record of the Chronicle interests were as follows:

| Year | Newspaper profit (loss) | Overall profit (loss) [21] | Accumulated surplus | Dividends |
|---|---|---|---|---|
| 1954 | $(702,470) | $490,660 | $1,957,290 | $120,000 |
| 1955 | (188,648) | 796,815 | 2,628,911 | 280,000 |
| 1956 | 10,914 | 927,518 | 3,359,959 | 180,000 |
| 1957 | (446,107) | 1,038,188 | 4,178,148 | 220,000 |
| 1958 | (425,006) | 729,803 | 4,690,280 | 200,000 |
| 1959 | (235,592) | 1,347,734 | 5,834,350 | 200,000 |
| 1960 | (250,128) | 1,308,711 | 7,016,114 | 220,000 |
| 1961 | (218,303) | 1,756,850 | 8,552,965 | 220,000 |
| 1962 | (1,220,384) | 1,095,442 | 9,428,408 | 220,000 |
| 1963 | (312,980) | 1,690,136 | 10,858,544 | 260,000 |
| 1964 | (53,816) | 2,325,485 | 13,062,242 | 280,000 |

[21] Including newspaper, broadcast and other. During the 11-year period covered by the table "other" revenues netted a total of $3,417,418.

It is plain from the foregoing that the losses of the newspaper were consistent and substantial, and were only approximately balanced by other non-broadcast income. Without the revenues from the successful broadcast operations the parent corporation could not have continued to pay dividends or show a regularly and substantially increasing surplus.

29. Nor were the other San Francisco papers faring better financially. While the record does not contain detailed figures, in 1960 alone the Examiner and News-Call Bulletin had a combined loss of some $3,000,000, and their loss approximated $15,000,000 for the 1960–64 period.

30. Chronicle saw increased circulation as its only hope of reversing its newspaper losses. It believed that increased circulation would attract greater advertising revenues, the increased revenues being greater than the increase in costs. Accordingly, it set out to increase its circulation, and to surpass the circulation figures of the Examiner. In formulating this intention Chronicle's management was interested only in improving the performance of their own paper, and did not have harm to any other paper as an objective.

31. The basic thrust of the campaign to increase circulation was a redesign of the paper to make it more appealing to potential readers. This involved such things as emphasis on the style in which stories were written, increased local news coverage, the development of local columnists and features; and modification of the physical make-up of the paper. However, promotional campaigns were also launched.

32. Between 1960 and 1964 at various times, merchandise premiums were offered to new subscribers, rates were reduced for new subscribers, charitable donations were made in the names of new subscribers, and a contest was held with cash prizes.



109-038—73——6

33. However, Chronicle was not alone in engaging in these practices. The Examiner initiated promotions around 1960, and actually devoted considerably greater sums to promotional activities than did Chronicle. Insofar as the record contains itemizations for the period in question, promotional expenditures were as follows:

| | 1960 | 1961 | 1962 | 1963 | 1964 |
|---|---|---|---|---|---|
| | | | Chronicle | | |
| Prizes and premiums | $84,056 | $119,616 | $120,835 | $137,666 | $72,233 |
| Total | 252,390 | 347,767 | 466,188 | 469,393 | 404,373 |
| | | | Examiner | | |
| Prizes and premiums | | | | 230,545 | 237,332 |
| Total | | | | 880,562 | 970,071 |

34. In the event Chronicle succeeded in increasing its circulation faster than its competitors, and supplemented the Examiner as the circulation leader. Both the Chronicle management and the chief executive officer of the Examiner's publisher share the opinion that the success was attributable to the Chronicle's increased reader appeal rather than to promotional activities. Since the Examiner fell behind during a period when it was materially outspending the Chronicle for essentially similar promotions, this opinion seems to be reasonable. The actual circulation figures were:

| | 1958 | 1959 | 1960 | 1961 | 1962 | 1963 | 1964 | 1965 |
|---|---|---|---|---|---|---|---|---|
| | | | | | Chronicle | | | |
| Total (daily) | 215,798 | 247,218 | 271,979 | 285,599 | 307,644 | 330,225 | 345,062 | 362,390 |
| Total (Sunday) | 271,578 | 300,443 | 313,992 | 316,823 | 335,516 | 352,138 | 369,394 | 383,893 |
| Total outside city zone (daily) | 148,141 | 172,383 | 190,802 | 202,069 | 221,416 | 244,506 | 256,887 | 271,995 |
| Total outside city zone (Sunday) | 194,227 | 217,680 | 226,473 | 229,002 | 245,729 | 263,461 | 377,884 | 295,731 |
| | | | | | Examiner | | | |
| Total (daily) | 258,420 | 265,836 | 277,812 | 256,475 | 292,764 | 291,125 | 292,551 | 301,418 |
| Total (Sunday) | 479,920 | 477,481 | 464,473 | 423,074 | 441,399 | 430,638 | 427,530 | 430,123 |
| Total outside city zone (daily) | 153,350 | 163,925 | 168,444 | 155,116 | 184,589 | 194,404 | 193,184 | 201,328 |
| Total outside city zone (Sunday) | 328,626 | 331,850 | 316,405 | 287,770 | 303,357 | 300,726 | 294,176 | 297,450 |
| | | | | | News-Call Bulletin | | | |
| Total | 140,861 | 210,903 | 206,256 | 200,615 | 185,918 | 187,078 | 182,216 | 192,099 |
| Total outside city zone | 54,288 | 74,785 | 71,878 | 72,622 | 61,930 | 64,593 | 59,473 | 68,553 |

35. From the foregoing, it is apparent that most of the collective circulation growth of the San Francisco metropolitan dailies was concentrated outside the city zone. However, the record is devoid of evidence that this was the result of a calculated policy. Indeed, with respect to Chronicle no effort was made to concentrate on gaining circulation in any particular area, and its promotion efforts were applied consistently through its nine county primary circulation area.

While the record does not explore the point, official notice can be taken that the area around San Francisco joined the areas surrounding most of the nation's cities in a sudden substantial growth of population during the period in question. It seems likely that the growth in suburban population is not unrelated to the growth in suburban newspaper circulation.

36. By 1962 the Hearst corporation had concluded that it was no longer economically justifiable to continue sustaining substantial losses in San Francisco (see para. 29, *supra*). Modernization costs, estimated at $12,000,000 did not seem warranted in light of the competitive situation,[22] and the alternatives were deemed to be merger with the Chronicle or establishment of a joint operating agreement. Hearst regarded an operating agreement as preferable because it would permit the retention of two independent editorial voices in the community, see paras. 43–44, *infra*. Accordingly, in the fall of 1962 Mr. Randolph Hearst approached Mr. Thieriot with an invitation to consider the establishment of a joint operating agreement for their respective San Francisco newspaper interests.

37. Thieriot was receptive to the idea. Although his own newspaper was able to cover operating expenses, it had a continuing history of losses after computation of amortization and depreciation (see para. 28, *supra*), and internal projections carried these losses into the future. While he was not privy to the Examiner's financial records, his judgment based on knowledge of the competitive situation was that the Examiner was also losing money. He had confidence in his own paper's competitive powers, but he was aware that Hearst commanded very substantial financial resources, and he was uncertain of the outcome if the two newspaper interests engaged in unlimited competition.

38. However, Thieriot regarded two pre-conditions as indispensable. First, it was apparent that if the physical plant was to be shared it could not produce two papers simultaneously. Thus, both could not continue as morning newspapers, and Thieriot believed it essential that Chronicle retain that role. Second, although Mr. Thieriot was aware that a number of joint operating agreements had been entered into around the country without legal challenge, it was apparent that the legality of such arrangements was arguable. Since the possible consequence of an adverse anti-trust decision on broadcast licensees had been suggested by a series of Commission and judicial actions, Thieriot was unwilling to enter into such an agreement without clearance in the form of a "Business Review Letter" from the Department of Justice.[23]

39. Hearst agreed to these basic conditions, and extensive explorations and negotiations were commenced. The presentation to the De-

[22] In reaching its decision Hearst took into consideration both competition with the Chronicle for the newspaper advertising dollars available, and the more fundamental competition with all other media—such as television—for the overall advertising dollars available.

[23] It is impossible to obtain an irrevocable commitment from the Department of Justice that it will never regard a given situation as violative of the anti-trust laws. However, under certain circumstances the Department will review a given factual situation and give a letter saying that it has no present intention of initiating anti-trust action under the circumstances in question. The procedure serves as a useful guide and an indication of lack of criminal intent for businessmen embarking on legally uncertain ventures.

partment of Justice was undertaken by counsel representing Hearst.[24] While his submission was pending Justice filed an anti-trust suit against a newspaper joint operating agreement in Tucson, Arizona. Although the Hearst lawyer regarded the two situations as distinguishable, he was of the opinion that the filing of the Tucson suit would increase the difficulty of obtaining a Business Review Letter in San Francisco. Accordingly, he recommended that the parties now insist on the Letter, but rely merely on the fact that they had made a full presentation to Justice and had not encountered actual disapproval. Mr. Thieriot declined to accept this procedure because he was unwilling to take any action which might jeopardize Chronicle's broadcast interests. He insisted that a Business Review Letter be sought, and in April, 1965 a formal request therefor was submitted to Justice.

40. In the meantime, on October 23, 1964 the joint operating agreement was executed. Briefly, it provides for:

(a) Creation of an equally owned corporation, the San Francisco Newspaper Printing Company, to handle the mechanical, advertising, business and circulation affairs of the two papers;

(b) Consolidation of the Hearst papers, the News Call Bulletin and the Examiner into a single afternoon paper, the San Francisco Examiner;

(c) Separation of the editorial departments of the Chronicle and the Examiner;

(d) Provision that each publisher will set its own advertising and circulation rates for its own paper, Sunday rates to be set jointly, but that the joint newspaper printing company will pool all the revenues of the two papers, pay all costs of both papers and retain 5% of any excess as its compensation, and distribute any remainder to the two papers in equal shares; and

(e) Provision that a single paper will be published on Sunday, the basic editing to be done by Hearst, but with the Chronicle to have responsibility for certain specified inserts.

41. At the same time there was executed a document which provided that the joint operating agreement would become effective only after clearance by the Department of Justice. Hence, it was not actually implemented until September 13, 1965, following receipt by Chronicle's attorneys of a letter dated September 7, 1965 and signed by the Attorney General of the United States which stated:

"On the basis of your submissions and our further review of the heavy losses being suffered by the Hearst newspapers in San Francisco, I wish to advise you that it is not the present intention of the Department of Justice to initiate anti-trust action against the implementation of the proposed production plan.

"As you know we are presently reviewing a number of other newspaper transactions which could conceivably raise related problems. Accordingly, the Department must, of course, be free to take any further action which may be required to insure equality of treatment should the question arise."

42. On July 24, 1970, long after the execution and implementation of the Hearst-Chronicle joint operating agreement, there was enacted the "Newspaper Preservation Act", 84 Stat. 466, P.L. 91–353. This Act, which on its face exempts from the anti-trust laws arrangements of the type here in question if approved by the Attorney General,

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[24] The primary thrust of the argument to Justice was that the Hearst papers were in danger of failing. Since the agreement was not to be effectuated absent Justice approval, the parties did not exchange financial data, but each submitted the financial information directly to the Department of Justice.

is retroactive in application. Hence, its apparent effect is to still any claims that the Hearst-Chronicle agreement is unlawful.[25]

43. As noted at para. 40, *supra*, the joint operating agreement contemplates that the two papers shall retain editorial independence. That intention has been effectuated. A study covering five 3-day periods selected on the basis of the Commission's composite week in 1968 revealed very substantial differences in the front pages of the two papers. Thus:

(a) There were a total of 352 front page stories. 91 (25.8%) were unique[26] to the Chronicle, 79 (22.4%) were unique to the Examiner, and 182 (51.8%) were common to both;

(b) There were a total of 6,797 column inches on the front pages—1,539 (22.6%) were devoted to events unique to Chronicle, 1,375 (20.2%) to events unique to Examiner, and 3,883 (57.1%) to events common to both.

(c) Of the 182 stories covering 56 common events, 16 (8.8%) were credited to the same source, and of the 3,883 inches devoted to common stories 482 (12.4%) were credited to common sources.

44. Similar diversity was displayed on the editorial pages. A comparison of the editorial treatment of ten major issues[27] over a ten month period in 1967–8 revealed:

(a) There was no disagreement on three of the issues;

(b) On the remaining issues disagreement ranged from 24.4% to 88.2%.

(c) Overall, in terms of space, of a total of 2,813 column inches, there was agreement of position as to 1,259 inches (44.9%), disagreement as to 1,342 inches (47.6%), and non-joinder on the issue as to 212 inches (7.5%).

45. One result of the effectuation of the joint operating agreement has been an increase in advertising rates. A committee headed by appropriate personnel from both papers was formed to evolve recommendations as to rates.[28] Their starting point was the preservation of existing newspaper revenues in San Francisco. However, they also wished to establish rates reflective of the value of the advertising to the advertisers, that is to say, representative of the rates charged for similar coverage in other parts of the country.

46. Their technique was to establish a combination rate which they deemed representative of comparable coverage offered elsewhere.[29] This combination rate was deemed to represent a one-third discount

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[25] The position of the Department of Justice in Tucson was upheld by the courts. *U.S.* v. *Citizens Publishing Co.*, 280 F. Supp. 978, Aff'd, 394 U.S. 131. While the factual situation in San Francisco may or may not be sufficiently different to render the judgment in *Citizens* inapplicable, the Court's action in Tucson at a minimum lent force to the arguments of those opposing the Hearst/Chronicle agreement. Had the Newspaper Preservation Act not been passed subsequently it might be necessary for this document to undertake a detailed analysis of the situation in San Francisco in light of the Court's explanation of the law governing Tucson.

[26] The "unique" stories may have been carried on inner pages of the other newspaper.

[27] The issues selected were those of significance commonly editorialized upon on five of the days in the Commission's 1968 composite week. (The other two days were excluded because there was a local newspaper strike in progress when they occurred.)

[28] Newspaper rates vary substantially according to total linage purchased over a given period of time. Thus, actual rate structures are very complicated, and not material in full detail to this Initial Decision. The rates discussed are those applicable to the most common category of advertiser.

[29] They were unable to find a city comparable to San Francisco in size with morning and evening papers having circulations on the order of those projected for the post-agreement Chronicle and Examiner. Accordingly, they selected as an alternative the city of Detroit, a city of roughly the same size where competitive conditions are similar, and in which one of the metropolitan papers has a circulation approximately the same as the projected *combined* Chronicle/Examiner circulation. The rate for this paper was used, after being reduced somewhat to allow for slightly lower production costs in San Francisco, to set the Chronicle/Examiner combination rate.

from the sum of the individual rates of the Chronicle and Examiner. On this assumption the sum of the individual rate of the two papers was ascertained by simple arithmetic. Finally, since Chronicle's circulation was projected to exceed Examiner by a 3 to 2 ratio, 60% of the sum of the individual rates was set as the Chronicle individual rate and 40% as the Examiner individual rate.

47. These rates were presented as recommendations to the individual publishers, and were accepted. Mr. Thieriot's reason for accepting was twofold. He regarded the rates theretofore in effect as too low because they had been insufficient to permit profitable operation, and he also anticipated that advertising space would represent greater value because of projected circulation increases. Since the rates were initially established there have been periodic increases, but the rate-making technique described has not been basically altered.

48. Subsequent studies have been made based upon annual compilations by the Pittsburgh Press of milline rates [30] of various newspapers around the country. These have shown that the individual rate for Chronicle and the combination rate for Chronicle/Examiner fall somewhere near the national norm.

49. Since the issue as to anti-competitive practices presents highly complex legal-factual interrelationships with which the Commission does not frequently deal, Chronicle was permitted to adduce expert testimony in the area. It offered as one of its witness Professor Eugene V. Rostow whose qualifications are such [31] that his opinions are entitled to substantial evidentiary weight,[32] and his uncontradicted assertions as to economic factors, national and market conditions, and economic trends form an appropriate basis for findings of fact.

50. Professor Rostow noted that the economic conditions which obtained in the San Francisco newspaper industry prior to the formulation of the joint operating agreement were not unlike those prevailing throughout the country. The growth of television had diverted a substantial percentage of advertising expenditures away from newspapers, and population shifts to the suburbs had operated to the disadvantage of central city daily papers. Under these conditions the economic competition between the Chronicle and Hearst papers was destructive, and Hearst's heavy losses put its newspapers into the "failing" category. Unless Hearst was willing to finance losses indefinitely, the only reasonable alternatives were merger or a joint operating agreement which would reduce costs of production and uneconomical competition.

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[30] Milline is the agate line rate divided by circulation expressed in millions. Such a concept is necessary in order to establish a common denominator for meaningful comparison of just what circulation individual papers deliver for a specified unit of expenditure.

[31] Professor Rostow's main area of academic interest has been industrial organization and market structure. He has been a member of the Yale faculty since 1938 and was Dean of the Yale Law School for ten years. He is currently a member of the Economics Law, and Graduate Economics faculties at Yale. He has taught law and economics at other universities in this country and abroad. He is the author of numerous books and articles in the fields of law and economics, and has held economic posts of the highest responsibility in various instrumentalities of the government of the United States. In 1967–8 he served as Chairman of the President's Task Force on Communications Policy. His testimony as an economic expert has been accepted by various courts, administrative agencies, and committees of the Congress.

[32] Professor Rostow's opinions as to the actual issues designated for hearing were not received.

51. Restow does not view the rates involved in San Francisco as anti-competitive because they do not involve below cost sales or force the user to select combination advertising unless he so wishes. Professor Rostow's view was shared by Dr. Irwin M. Stelzer, another witness whose qualifications are such as to inspire confidence in his economic studies.[33] Dr. Stelzer conducted an incremental cost study which established not only that the Chronicle/Examiner combination rate does not require Chronicle advertising to be printed in the Examiner at a loss to the Printing Company, but that the margin of revenue above costs for such advertising is about the same as the profit margin on gross income as is realized on overall business.

52. This is not to say that implementation of the joint operating agreement has been without adverse impact on anyone. Combination of the business and production facilities of the newspapers resulted in the loss of employment by certain employees whose positions had become duplicative.[34] Businesses which utilized extensive newspaper advertising were confronted with materially increased costs, and were required to either absorb them or pass them on to their customers.[35]

53. A further consequence was a squeeze on the independent dealers who distributed the newspapers, one of whom appeared as a witness. This individual, William F. Wyman, was an Examiner distributor prior to the implementation of the joint operating agreement. He operated in Richmond, California, furnishing daily and Sunday home delivery, primarily through carrier boys, and daily and Sunday street sales. When the agreement went into effect he was informed that he would still distribute the morning paper, but that paper would be the Chronicle. However, the street sales were given to the original Chronicle dealer, and many of his former Examiner subscribers did not want the Chronicle. As a result he not only lost customers, but carrier boys as well when their routes became insufficiently profitable. Thereafter, his home deliveries were taken away, and he was effectively out of business.

54. Later, upon the retirement of the original Chronicle dealer in Richmond, the dealership was cut in half and one of the territories was given to Wyman. However, subsequent adjustments in the prices at which the papers were sold to him and at which he was

[33] Dr. Stelzer has taught economics and anti-trust courses at several universities. He has been employed by the Twentieth Century Fund and the Brookings Institution in relation to anti-trust impact studies in various industries. He has written a textbook in the anti-trust field, and has published articles on the subject in various economic and legal periodicals. He is editor of the Anti-Trust Bulletin, and is presently a consulting economist. His testimony as an expert in pricing has been received by various courts, administrative agencies, and committees of the Congress.

[34] For example, Mrs. Blanche Streeter, one of the Complainants in this proceeding.

[35] A witness testified that he was a former officer of a business engaged in selling bankrupt stocks, close-outs and things of that nature; that the business depended largely on promotion, and employed the News Call Bulletin and Sunday Examiner as its primary newspaper outlets; that its expenditures on newspaper advertising averaged $200–250,000 per year; that when the newspaper rates were raised it could obtain only some 50% as much advertising for 150% more money; that the business was unable to absorb the increased advertising cost; and, as a consequence, was obliged to close after a 50-year existence. However, cross-examination disclosed that for the year prior to its closing—which included 5 months subsequent to effectuation of the joint operating agreement—the business showed a profit; that the witness was uncertain as to the specific relationship between total advertising costs and gross sales; and that he didn't recall what newspaper advertising rates the business was paying either before or after the rate rise. Such a showing does not convince the Examiner that the sole or primary cause of the cessation of the business was the increase in advertising rates.

authorized to resell to his customers rendered the dealership insufficiently profitable. Accordingly, he raised the price at which he sold to his customers, although such action was not permitted by his dealership contract.

55. Upon learning of this action the Chronicle representative with whom Wyman dealt advised him that his dealership was terminated. However, higher Chronicle management did not ratify this action, and Wyman has continued as a Chronicle distributor. Both before and after this incident other distributors raised their prices to their customers, and Chronicle did not move to terminate their dealership.

56. As noted in the order of designation, it has also been alleged that the rate structure established after the implementation of the joint operating agreement operated to take away advertising linage, especially department stores advertising, from newspapers outside of San Francisco, specifically the San Mateo Times. The record does not support this charge.

57. Retail advertising lineage in the Times has not decreased. It rose in terms of column inches from a 1965 figure of 814,756 to a 1968 high of 1,006,001 before tailing off in 1969 to 978,778. Linage on behalf of the eight major San Francisco department stores has also increased in the San Mateo Times, but has decreased in the metropolitan dailies.[36]

58. The record also explores the Chronicle's use of syndicated materials. It is common practice in the newspaper industry for syndication contracts to provide for territorial exclusivity, and such practice confers benefits on both the syndicator and the newspaper. The former receives higher prices from individual members of a simplified market, and the latter is able to promote readership by providing an exclusive source of items of interest.

59. Chronicle has either been offered or has requested territorial exclusivity with respect to most of its syndication contracts. In the past the area of exclusivity has often been extensive—"Northern California," etc.—but it now seeks exclusivity only in the nine county "Bay Area." This territory is not more extensive than that claimed by metropolitan dailies in other major cities around the country. Professor Rostow expressed the opinion that such exclusivity is not unreasonable since it extends only into areas within which the Chronicle is a serious competitor for a significant share of the newspaper readers.

60. Of some 2,200 nationally syndicated features available Chronicle has rights to 70. The record furnishes no basis for an objective judgment as to whether the syndicated material represents the most desirable 3% of what is offered, but it is shown that other newspapers of national repute such as the Los Angeles Times, the Chicago Sun-Times, the Washington Evening Star, the Baltimore Sun and the Philadelphia Bulletin have selected substantially different syndications for publication.

[36] The total department store linage in the Bay Area dailies rose steadily from 13,594,794 in 1964 to 16,018,505 in 1966, and 19,782,665 in 1968. The San Mateo Times shared in this increase with linages of 1,853,362 in 1964, 2,475,421 in 1966, and 3,179,377 in 1968. However, the combined San Francisco papers, which had a 1969 share of 12,592,564 lines, rose in 1966 to 13,186,562 lines, but fell in 1968 to 9,559,638 lines.

61. Chronicle publishes approximately 10% of the syndicated material it purchases. However, the percentage varies greatly from item to item. Features such as comics tend to be published in full every day, whereas other items may be published seldom or never. This is not the result of an intention to keep the material from competing papers. Some of the syndications purchased do not live up to their samples and are rarely published. Others are sold as part of a package and, in order to get features it wants, the paper is obliged to purchase others which it does not desire and has no intention of publishing. Still other material is essentially duplicative of that derived from alternative sources.

62. The syndication contracts presented by the syndicators contain clauses forbidding sublicensing or gifts of the material. Hence, the exclusive material which Chronicle purchases but does not publish is not available in any other Bay Area paper. The record does not indicate that Chronicle has offered to waive its exclusivity for unwanted material, although over the years it has accepted cuts in its geographical area of exclusivity in order to keep the price of the features down.

63. Chronicle's practices with syndicated material conform to those of the industry as a whole, and it deems them necessary if it is to compete effectively in the suburbs. This is because suburban papers tend to have superior news coverage of their own suburbs, and a metropolitan paper needs something the suburban paper cannot provide. Nevertheless, the result is to deprive the suburban papers of material they might otherwise elect to make available to their readers. Thus, when the publisher of the San Mateo Times sought to obtain supplemental news services in order to retain subscribers, he was rebuffed, in part, because of the territorial exclusivity already granted to the San Francisco papers which circulate in San Mateo.

64. The record contains statistical studies and other evidence as to what has actually transpired in the area where the San Francisco papers are a material competitive force. A study conducted for the 1964–68 period of all counties in which the San Francisco newspapers and at least one suburban newspaper each have at least 5% household penetration [37] revealed an increase in circulation and household penetration for the suburban papers and a decrease for the metropolitan dailies. Thus, the total circulations and household penetration percentages of the suburban papers rose from 563,485 (56.0%) in 1964, to 632,469 (56.6%) in 1966, and to 669,876 (56.6%) in 1968. At the same time the corresponding figures for the San Francisco papers fell from 367,516 (36.5%) in 1964, to 328,299 (29.4%) in 1966, and 318,490 (26.9%) in 1968. This pattern was consistent through all ten counties, in each of which the San Francisco papers lost total circulation and percentage of household penetration between 1964 and 1968, and in each of which the suburban papers gained circulation, although not necessarily increasing their percentage of household penetration, during the same period.

[37] Alameda, Contra Costa, Lake, Marin, Monterey, San Benito, Santa Clara, Santa Cruz and Tuolumne counties.

65. With specific reference to San Mateo county,[38] a similar pattern prevailed. The San Francisco papers showed decreases in circulation, percentage of total circulation and percentage of household penetration as follows: 1964—113,376, 64.00%, and 72.5%; 1966—103,174, 56.96%, and 62.6%; 1968—100,684, 54.12%, and 58.2%. The corresponding figures for the combined suburban papers were: 1964—63,296, 35.73%, and 40.5%; 1966— 77,709, 42.90%, and 47.2%; 1968—85,187, 45.79%, and 49.2%. With specific reference to the San Mateo Times its shares rose: 1964—32,163, 18.16%, and 20.6%; 1966—40,929, 22.59%, and 24.9%; 1968—47,347, 25.45%, and 27.4%.

66. In terms of advertising linage the same competing suburban papers have also shown a stronger performance than have the San Francisco papers.[39] Thus:

| Newspaper | Total linage (thousands), market share, and percentage change | | |
|---|---|---|---|
| | 1964 | 1966 | 1968 |
| Combined Suburban | 197,224 & 74.26% | 216,874, 78.96% & 10.0% | 218,787,81. 20% & 0.9% |
| San Mateo Times | 16,629 & 6.26% | 18,089, 6.59% & 8.8% | 20,662, 7. 67% & 14.2% |
| Combined San Francisco-Chronicle | 68,378 & 25.74% | 57,790, 21.04% & (15.5%) | 50,646,18. 80% & (12.4%) |
| | 26,074 & 9.82% | 28,304, 10.30% & 8.6% | 25,071, 9. 31% & (11.4%) |

*Issue No. 3: News Management*

67. Firm findings of fact on this issue are not simple of formulation. The record consists of the often fragmentary or inferential knowledge of the members of a more or less constant group concerning a relatively small number of incidents. To clarify what is involved and the viewpoints of the various witnesses it will be helpful to consider the genesis of the issue.

68. Albert Kihn had been employed at KRON–TV since 1960 as a cameraman covering news stories, generally in the company of a reporter. He was regarded by his superiors as being more than ordinarily proficient at his duties. However, by 1964 he had become disenchanted with his employment. He formed the opinion that business considerations are accorded weight in the journalistic decisions of broadcasters, and to establish this point he commenced the compilation of what has come to be known as the "Kihn diary".

69. The diary consists of a series of typewritten pages each containing an entry for one or more days. Not every day has an entry. Most, but not all, of the material is related in some way to the activities of KRON or members of its staff. It was Kihn's practice to take handwritten notes at or about the time events which he deemed significant occurred. He would later type these notes onto the pages which became the diary.[40]

70. Some entries contain references to events of which Kihn had personal knowledge, but others purport to be quotations or summaries

[38] Singled out because of references in the order of designation to competitive conditions in that county.

[39] With reference to the more specific category of San Francisco department store advertising, see footnote 36, *supra*.

[40] The diary entries are often without sentence structure and words are frequently reduced to personalized abbreviations. Since Mr. Kihn is a well spoken man it can be inferred that the diary entries are verbatim copies of hastily written notes.

of remarks by others concerning events which Mr. Kihn did not observe. These remarks were made in varied contexts. Some were spoken in the course of serious discussions. Others were uttered in very informal circumstances, and some are simply employee gripes. Although many people were aware that Mr. Kihn made a practice of taking notes, few knew that their remarks were included in those notes, and none knew that he was compiling a diary.

71. Kihn made no secret of his views. In May of 1966 he addressed a memo to Pack Phillips, Station Manager, expressing what he believed to be fundamental disagreement with station's concept of news programming. However, although Phillips discussed the matter with him, the station failed to conform itself to Kihn's ideal. Accordingly, when the license came up for renewal Kihn believed that the Commission should be acquainted with what he regarded as basic deficiencies in performance. Therefore, he wrote his letters of September 8 and December 22, 1968 which led to this hearing.

72. In evaluating the evidence it is necessary to keep in mind the relationships that exist in the KRON news department. The reporters and cameramen, while in the actual performance of their duties, are largely free of supervision. The quality of the stories, and to a large extent their nature, is dependent on the talent, training, resourcefulness and initiative of the individual newsmen, and it would be impractical to attempt a detailed supervision of their work.

73. Nevertheless, this freedom is fettered at both its beginning and its end. While newsmen may occasionally cover a story without instructions when it comes to their personal attention unexpectedly, most stories are covered pursuant to assignment. The assignment editor must allocate his personnel among numerous stories each day: some events of which he had foreknowledge; and other fast-breaking stories. Obviously, these assignments vary widely in their interest and significance, and there is room for disagreement as to the priorities they should be accorded.

74. Furthermore, after the stories have been covered decisions must be made as to their presentation. Editors must structure news programs. Some stories will be emphasized, others pared or eliminated. The decisions must be made on the basis of both the newsworthiness of the stories and the quality of the coverage. Here, also, the possibility of differing judgments is apparent.

75. Thus, the newsman, while almost completely free to act as he sees fit while actually covering a story, is subject to close supervision in both the assignment of stories and the ultimate use of his work product. Under such circumstances informal techniques of administration prevail. Virtually everyone is on a first-name basis. If a newsman disagrees with an assignment or editing he can voice his objection with some assurance that his opinion will be considered. While final decision remains in the hands of a supervisor, he will tend not to simply give orders to a disagreeing employee but to provide some explanation for his action. Only thus can friction be avoided when the newsman, who is his own boss while covering the story, is obliged to conform to the decisions of others with respect to assignment and editing. However,

since the supervisor's motive is usually not to conduct an exchange of ideas, but to secure the cooperation of his subordinate, his explanation for his actions may or may not be candid. It is in this context that the events about to be recounted must be evaluated.

*CATV Related Stories*

76. By November of 1964 the CATV industry had grown to the point that Mr. See regarded prospects as warranting a recommendation to Mr. Thieriot that it should be considered as a business venture. Thieriot approved exploration of the matter, and starting in April 1965. See addressed letters to various California communities inquiring about franchises.

77. At the very start of Chronicle's CATV interest Thieriot and See agreed that there must be a separation between CATV and the publishing and broadcasting activities. Such a policy was established. However, the immediate results of the policy were not overt. See was the executive in charge of CATV activities with Thieriot retaining the final decision as to which franchises would be sought. In carrying out his duties See made occasional use of the services of Aldo H. Constant, Vice President of Chronicle Broadcasting and General Manager of KRON–TV, L. A. Denny, KRON Treasurer, and Lee Berryhill, KRON–TV Chief Engineer. The services of subordinate employees were also utilized on occasion. This situation continued at least until March of 1967 when Edward Allen was employed as Vice President of Western Communications. Thereafter a completely separate staff was built up with no identity of personnel at a level lower than Mr. See.[41]

78. Nevertheless, it is alleged that KRON's programming was in certain instances, tailored to facilitate Chronicle's applications for CATV franchises. One of these allegations concerns a program relating, in part, to the city of Vallejo, California.

79. The concept of the program was born on March 16, 1966 at a "community luncheon" held at Vallejo and attended by Messrs. See, Constant, and various KRON department heads.[42] Among the guests attending the March 1966 luncheon were representatives of various communities and groups in the "North Bay" area.[43] They included Mayor Florence Douglas and City Manager Lohn Ficklin of Vallejo. Each suggested, Mr. Ficklin in the form of a hand-addressed letter, to a KRON representative that their community would serve as the subject of an interesting documentary program. At the close of the meeting See told the guests that he would direct his staff to explore the concept of a documentary program on the North Bay area.

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[41] However, as a practical matter the lower level team spirit lingered on. As late as October, 1967, See was obliged to write a memo instructing CATV and broadcast employees as to the proprieties of their conduct toward each other.

[42] The luncheon was one of a series originated by the KRON Public Affairs Department in 1961 as a more efficient way of determining community needs and interests. Since their inception a total of 72 luncheons in 17 communities have been held with attendance ranging from 27 to 60 persons. The location and guest list of the luncheons is decided by KRON's Public Affairs Director, and Mr. See has no role in the selection other than his original instructions to rotate the affairs throughout the Bay Area and make the guest lists representative of the surrounding area. Since 1961 five community luncheons have been held in Vallejo.

[43] San Francisco Bay extends roughly parallel to the Pacific Coast for substantial distances both north and south of the Golden Gate entrance from the ocean. Vallejo is one of a cluster of communities at the North end of the Bay.

80. The following day Mr. See instructed Pack Phillips, then KRON Program Manager, to proceed with development of a documentary on the North Bay area. The program concept was not limited to Vallejo, although that community would be a part of the overall subject. Phillips selected Robert Anderson, then employed by KRON–TV as a documentary writer and producer to handle the project. From that point on there is substantial conflict in the record as to what transpired.

81. Mr. See recalls that he told Phillips to send him the writer on the documentary before the man started work on the story. He says Anderson came to his office, probably on March 18, 1966; that he described the sort of program KRON was interested in developing; and that he cautioned Anderson not to develop a program emphasizing political personalities because Chronicle might be interested in CATV in Vallejo, and See did not want to appear to be favoring one political side or the other. See's recollection receives circumstantial support from Phillips who recalls having told Anderson to report to See before going to Vallejo. Anderson denies that he saw See or discussed the matter with him before going to Vallejo.

82. In any event, the record is clear that Anderson went to Vallejo on March 22, 1966, and devoted a total of some six hours to a preliminary survey of the community. However, there is considerable controversy as to just what that survey consisted of. Anderson recalls speaking to Mayor Douglas, City Manager Ficklin, and numerous men-on-the-street. His overall impression was of a community split into factions crying for an exposé. The Mayor spoke ill of the city council, the city manager spoke ill of the Mayor, and all of the men-on-the-street spoke of corruption and scandal.

83. Anderson testified that this survey led him to conclude that a show should be prepared exposing the conditions in Vallejo, and he returned to KRON with a recommendation to that effect. When he reported to Phillips and to Richard Behrendt, then Production Manager and Phillips' assistant, he was told that his story concept was unsuitable, and that what was wanted was a program emphasizing the positive aspects of Vallejo. Phillips and Behrendt generally support Anderson's testimony on this point.

84. Shortly thereafter Anderson says he was called into See's office where See also told him that his idea for an exposé was not what management had in mind, and that he would have to produce a show of the sort outlined by Phillips. When Anderson asked why, See told him that KRON had a CATV interest in the area and nothing must be done to jeopardize it. Anderson's version receives support of a sort from the testimony of co-workers who remember him referring to the incident at various times.[44] See, however, denies that he ever made the

[44] Jerry Jensen, a news reporter and newscaster who did the narration of the show ultimately produced recalled that at the recording session for the show Anderson told him he was embarrassed by the way it was laid out, but that it had to be done that way because the Chronicle was interested in applying for a CATV franchise in Vallejo. Alfred Berglund, a KRON documentary writer and producer recalls Anderson stating at the time that he had been instructed to prepare a program to make Vallejo look good. On or about April 8, 1966 Anderson told Mr. Kihn that he had received instructions to do a documentary on the North Bay, with emphasis on Vallejo, because of the station's CATV interests up there.

remarks attributed to him or that, in fact, Anderson ever discussed the matter with him after returning from Vallejo.

85. Considerable evidence was adduced for the avowed purpose of discrediting Anderson. If such impeachment was offered to show him out a deliberate liar, the Examiner is unpersuaded. Anderson's demeanor as a witness was entirely favorable, and his testimony lacked the earmarks of knowing falsification. However, to the extent that the impeachment was designed to show Anderson's recollection to be dim, several telling points were made.

86. Anderson was very vague on the circumstances of his recollection. He was uncertain of exactly who assigned him to the story, or what its state of preparation was when he was assigned. He was uncertain of how many days he spent in Vallejo, and the fact that he spent just one day was established through the circumstantial evidence of employee time sheets and expense vouchers. He could identify most of the people he spoke to in Vallejo by apparent occupation, but he could not remember just who said what. He remembers reporting to someone at KRON regarding the Vallejo trip before he was called into See's office, but is uncertain whether it was to Phillips or Behrendt. Indeed, it is only with respect to See's damning statements that Anderson's recollection is clear and certain.

87. Nor does Anderson's version of events find support either in his contemporary notes or in the recollection of the individuals he interviewed. His contemporary notes, which were retained in the KRON files, refer only to the Douglas and Ficklin interviews and have no reference to conversations with anyone else. Moreover, although they are fairly detailed, they contain no hint of the sort of events upon which an exposé might be based. While neither Mrs. Douglas nor Mr. Ficklin claims a complete recollection of their interviews with Anderson, neither recalls saying anything about sensational happenings.

88. The record contains one final, rather unusual item of evidence relative to what transpired. In June of 1967 Kihn, Anderson and one Larry Russell had an informal discussion in which the matter arose. Kihn taped the conversation. In the course of that conversation Anderson stated, ". . . they told me ahead of time why they wanted the show done . . ." Later he stated, ". . . But I also did some additional investigating as to where the weak points were and who they ought to talk with and stuff they could get on [a local political figure] and stuff. I gave them a lot of background on it. So they could blackmail him." When Kihn expressed surprise at this statement Anderson repeated "so they could blackmail him", and when Kihn inquired "into what?" Anderson replied "If they needed it. And Harold [See] said, 'Don't worry. We won't need to use that kind of thing. I can manipulate [the local politician] without him even knowing it.'"

89. In any event, Anderson actually produced the North Bay documentary which was titled "Where the Bay Begins". The show covers several North Bay communities, 38% being concerned with Vallejo. It centers on the economics and demography of the area, and is in no sense an exposé.

90. From the foregoing it is clear that there was a See-Anderson conversation regarding the North Bay documentary, and that the

subject of CATV arose. Considering all of the circumstances, the Examiner is not persuaded that a finding adverse to Chronicle is warranted.

91. First, it should be noted that insofar as Anderson differs with See, there is no evidence whatsoever supporting Anderson's version. What evidence there is, while inconclusive, supports See. Thus, Phillips recalls instructing Anderson to call on See before going to Vallejo. Absent any evidence to the contrary, it is fair to infer that Anderson complied with this unambiguous direction from his superior. Moreover, Andersons' own memory in June of 1967 was that he was apprised of the CATV situation prior to going to Vallejo, and he does claim that anyone other than See discussed CATV with him at this time. From this, it is found that the See-Anderson conversation took place before, not after, Anderson went to Vallejo.

92. Once the time of the conversation is established See's version becomes far more credible than Anderson's. If Anderson has not yet been to Vallejo, then he did not yet have the information upon which to formulate a plan for an exposé. If he had no such plan, there was no reason for See to placate him by explaining that an exposé might jeopardize CATV interests.

93. Moreover, See's story makes sense in the light of contemporary circumstances. Chronicle was interested in CATV in the area.[45] See was aware that the choice of the CATV operator as well as the conditions of operation would be determined by elected officials or their advisors. It would be natural for See, who had responsibility for both Chronicle's broadcasting and CATV interests, to take steps to insure that one set of interests did not impinge on the other.

94. However, it is entirely possible that Anderson misconceived the thrust of See's cautionary language. Apparently Anderson understood See to mean that one of Chronicle's hands should wash the other. With such an understanding it was not unnatural for him to seek out information which might be used to "blackmail" local officials into favoring Chronicle's position. When that approach was rejected by his superior, it would also be natural for him to feel and express resentment to his fellow employees.

95. The probability that this is what happened is enhanced by the extreme vagueness of Anderson's recollection of the event. Although he believes he remembers his conversation with See in detail, everything else about the incident is uncertain. Such selective recollection does inspire confidence in the testimony of a witness whose version of events is uncorroborated.

96. For these reasons it is found that in this instance Chronicle's CATV interests affected the management of KRON only to the extent that they inspired Mr. See to acquaint Mr. Anderson with their existence and to caution him against conducting himself in a manner which might appear to be pandering to political figures in Vallejo in order to secure their support.

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[45] See had notified the city of Vallejo of an intention to apply for a CATV franchise by letter of April 23, 1965. In January, 1966, he attended a meeting in Vallejo at which a prospective CATV ordinance was discussed, and in February, 1966 KRON had engineering studies conducted of Vallejo CATV prospects. Although Chronicle's interest waxed and waned toward Vallejo CATV over a period of time, it did not expire until late 1967 when the community enacted an ordinance which Chronicle regarded as undesirable.

97. On August 14, 1967, Chronicle Publishing Co. filed an application for a CATV franchise in San Carlos, California. It is alleged that the pendency of that application influenced the coverage of an event in San Carlos, the bi-annual "Chicken's Ball".

98. Every even numbered year the combined PTAs of San Carlos, a community some 20 miles south of San Francisco, present the Chicken's Ball to promote community spirit and raise money for their projects. It is an amateur talent show consisting of skits put on by local organizations. However, it is considerably more elaborate than such a description suggests. Planning occupies substantial periods of time, and many organizations present skits, the best eight of which are chosen for the show itself in competition. Between 1,000 and 1,500 people are involved in the production, and performances are sold out with tickets at a premium. KRON has covered the event for some years: in 1962 that coverage was aired for 3 min. 50 sec.; in 1964 for 8 min. and 5 sec.; and in 1966 for 4 min. 10 sec.; all on "Bay Region Report", a weekly program devoted to events throughout the Bay region.

99. Planning for the 1968 Chicken's Ball commenced in April, 1967 with the appointment of a General Chairman. She promptly appointed two assistants: a co-chairman and a production manager. The production manager in turn appointed as her assistant Mr. Paul Kelly, a former Mayor and City Councilman of San Carlos who had participated in the production of Chicken's Balls over the previous ten years. Kelly was also attorney for Chronicle's San Carlos CATV applicant.

100. At a committee meeting in mid-summer of 1967, the subject of television coverage arose. In the past letters had been written to KRON asking coverage, but Kelly remarked that he was in frequent contact with See and would present the request personally. Shortly thereafter in the course of a telephone conversation with See Kelly made the request, and See assured him that the event would be covered again.

101. The ladies of the committee continued to mention the matter to Kelly from time to time, and asserted that they would be pleased if the coverage could be more extensive than in previous years and in color. In October, 1967 See and Kelly, who had attended a city council meeting, casually encountered two members of the Committee. Upon being introduced, the ladies took the opportunity to press their requests upon Mr. See personally.

102. In early January, See called Kelly and told him that KRON's Chicken's Ball coverage would be in color. Kelly promptly told the ladies of the committee, and also added the information as a post-script to a letter he wrote on January 12, 1968, regarding service on the proposed CATV system to Mayor George F. Seager of San Carlos.[46]

103. In the meantime See took action to effectuate his commitment to Kelly. In early January he called Mel Kampmann then KRON News Director, into his office and instructed him to arrange coverage of the event. See suggested that the coverage should be in color, and Kampmann agreed. See gave Kampmann Kelly's name as a contact for

[46] Kelly asserts that he intended the post-script as merely a communication of information which he knew would be of personal interest to an old friend. Nevertheless, as an experienced lawyer and former office holder, he could not have failed to realize that the context in which the message was presented inevitably emphasized the connection between KRON and the CATV applicant.

program planning, and noted that, since "Bay Region Report" on which the event had previously been carried was now cancelled, a new spot would have to be found for it.

104. In connection with the time slot problem See had already contacted Mr. Richard Behrendt, then KRON's Program Manager, and suggested that the program "Community Circle" be used. Kampmann and Behrendt agreed that a ten to twelve minute segment of that program would be suitable. This decision was communicated to the show's producer, Lee Noble, who blocked out of 15-minute segment of the program to accommodate the Chicken's Ball film.

105. Kampmann, who in the meantime had become aware that See had been appointed one of the judges of the skits to be presented at the Chicken's Ball and would, therefore, be in attendance, assigned Mr. Terry Morrison, a KRON cameraman, to attend a rehearsal of the Ball and report as to coverage requirements. Morrison recommended the use of two cameras. Based on this recommendation Kampmann told Mr. Evan White, KRON's Assignment Editor to assign two cameramen and that he, Kampmann would serve as reporter.

106. White regarded the story as being of marginal interest. Accordingly, he inquired why it warranted two cameramen, the use of color film, and the unprecedented services of the station's News Director as a reporter. Kampmann responded that the coverage was relative to the seeking of a CATV franchise in that area. In response to a similar inquiry by Terry Morrison, Kampmann gave a similar answer.

107. At this point in the recountation of the events surrounding the Chicken's Ball a digression is in order. As will be noted, from time to time various individuals serving in intermediate supervisory capacities at KRON contemporaneously stated that certain stories were covered only to accommodate Chronicle's CATV interests. The relevance of such statements is readily apparent, and they were received in contemplation of further evidence either that they were based on knowledge or could be presumed to be so based. Nevertheless, except as may be noted, the Examiner now regards them as without probative weight. The individuals to whom they were attributed were middle management personnel whose duties were related to the operation of KRON as a television station, not the business activities of either the station or its owners. If, in fact, KRON programming was being used to advance Chronicle's business interests, it would have been necessary to issue appropriate orders to these people, but it would have been neither necessary nor natural to have informed them of the motives for such orders. Hence, there is no presumption that their statements in this area are based on actual knowledge.

108. This is not to say that they could not have possessed such knowledge: only that it must be proven and not presumed. Such proof is totally lacking. None of them, whether still employed at KRON or not, acknowledge that their actions were at any time designed to help their employer's business interests, and no evidence establishes that their superiors at any time suggested, directly or indirectly, that they so conduct themselves. Although many of the witnesses did not recall having made the specific statements attributed to them, all acknowledge



109-038—73——7

that they might have been made, and the explanations for such possibility present a common theme. Apparently, at about this time the "in" joke at the KRON newsroom was that any uninteresting or unimportant assignment was motivated by a desire to advance a CATV interest. This explanation was offered by everyone short of top management. However, with the exception of Mr. Anderson whose testimony has not been credited, there is no evidence whatsoever that anyone ever stated that *his own decision*, as opposed to one made by superior authority, was based on business considerations. Moreover, there is no evidence that anyone ever stated that he had actually been told by a superior that the superior's decision was based on CATV considerations. In short, the CATV motivation of KRON's management was one of those things which "everyone knows", but which, when put to the proof, is wholly lacking in demonstrable factual foundation.

109. In any event, the Chicken's Ball was covered by Kampmann and two cameramen, and an unusually large amount of color film was shot. After viewing the film Kampmann formed the opinion that enough of it was useable to make a full half-hour show. He so suggested to Behrendt, who agreed after checking it with Noble. As a result the full half-hour of the community circle program of February 18, 1968 was devoted to the Chicken's Ball.

110. One further matter should be considered. Mr. Frank Sutton, then a news cameraman for KRON, testified that at about this time he overheard a conversation between Messrs. Constant, Kampmann and White wherein either Constant or Kampmann responded to a question by White that the reason for the extensive coverage of the Chicken's Ball was to impress upon the governing authorities in San Carlos the connection between KRON–TV and the then pending CATV applicant. Despite detailed cross-examination Sutton was unable to be more precise or to recall anything whatsoever about the context of the conversation or contemporaneous events. Constant and Kampmann denied that the incident took place, and White was unable to recall Constant as being present when he discussed the matter with Kampmann.

111. The incident, if true, would represent the only instance where a management official as high as Mr. Constant was on the scene when a lower echelon KRON supervisor asserted that CATV interests were concerned in a news assignment. However, the record does not warrant a finding that Constant was actually there. No one but Sutton claims to recall the incident, and his memory is so vague that he doesn't even recall whether the remark was made by Constant or Kampmann. Constant and Kampmann deny that the incident ever occurred, and White does not refer to Constant as being present during his discussion with Kampmann (para. 106, *supra*). The weight of the evidence tends towards a finding that Constant's presence at the conversation exists only in Sutton's unclear recollection of the event.

112. Shortly after the 1968 Chicken's Ball the San Carlos CATV franchise was awarded to one of Chronicle's competitors.

113. In the Examiner's view the weight of the evidence does not support a finding that the coverage of the 1968 Chicken's Ball was influenced by Chronicle's interest in CATV in San Carlos. While no

one contends that the event attained the first rank of significance as a news story, it did occupy the attention and energy of a large number of San Carlos residents, and the interest of still more. For that reason KRON had covered it for several years, and the record provides no reason to doubt that the station would have routinely covered it again in 1968. There is nothing to suggest that See's favorable response to Kelly's request for a 1968 coverage differed in any way from his equally favorable personal response in 1964 when that year's chairman wrote him requesting coverage.

114. See's participation in the arrangements for coverage did not intensify over previous years until after his chance meeting in October, 1967, with two ladies of the committee. Thereafter he did nothing more than respond to their opportuning by directing that the coverage be in color, and giving instructions to his subordinate, Mr. Kampmann, to take care of the matter.

115. Thereafter, it was Kampmann who handled the affair, and there is absolutely no evidence indicating that his decisions were influenced by CATV considerations. A far more commonplace motive suggests itself. Kampmann knew that his boss was interested in the Chicken's Ball and was going to be there. It is natural that he should decide that his department would put its best foot forward. That is exactly what it did. This record demonstrates nothing more than that Mr. See was led to unusual interest in the event because of fortuitous personal contacts with members of the committee, and that his staff recognized his interest and responded in a very human fashion.

116. In March 1966, Chronicle filed an application for a CATV franchise in South San Francisco, a city not politically a part of San Francisco. The application remained pending until its grant in April, 1967.

117. Mr. See has a vague recollection of someone, he cannot recall who, contacting him in December, 1966 to complain that the station paid too little attention to events in South San Francisco, and to tell him of a potentially interesting story about the dedication of a library with a bomb shelter in its basement.[47] See discussed both matters with Kampmann. As a result Kampmann sent a memo to Evan White, Assignment Editor, on December 20, 1966, stating[48]:

"From: Mel Kampmann; To: Evan White: Copy: Don Picken; Copy File: Between now and the first of February, let us concentrate a little heavier on SOUTH San Francisco—if warranted. HPS would like to make those people happy, and suggests a new library with a 'central system' of some kind that got them fed funds . . . opening 29 January. . . . . If either of you spot something civic or newsworthy happening in South San Francisco, set it up. MJK: mc"

The Don Picken to whom a copy was sent was a reporter than in the employ of KRON.

118. Upon receipt of the memo White asked Kampmann why it was necessary to cover the library dedication. Kampmann replied that See wanted it done because of Chronicle's CATV interest in South San

[47] Mr. See receives such tips of stories frequently and from diverse sources.

[48] The authenticity of the quoted memo is unchallenged. Because there is a challenge to the authenticity of the memo discussed at para. 121, *infra*, and part of the argument is based on style, this memo is quoted in its entirety.

Francisco. However, the record does not indicate that anyone told anyone how the dedication should be covered.

119. Thereafter, in February, 1967, Dr. Robert Alvarez, Director of the Public Library System of South San Francisco, initiated telephone calls to several local radio and TV stations seeking coverage of an art show being held at the new library. At KRON he was referred to Don Picken who promptly came over with a cameraman and filmed the show. Alvarez invited Picken to cover the library dedication which was coming up in a few days, and Picken indicated that he would if he could. On February 13, 1967 Kampmann wrote a memo to See describing the coverage of the art show. He further stated: "We still plan to do the dedication ceremonies as discussed."

120. In the meantime, an assignment was made for a KRON crew to cover the library dedication. The manner of that assignment is a matter of unresolved controversy. On the one hand, Kampmann recalls receiving an orange publicity brochure from the South San Francisco library system relating to the dedication.[49] He wrote his instructions for coverage on the brochure and passed it on to Evan White to be assigned. No copy of this brochure was found in KRON's files.[50]

121. On the other hand, Mr. Kihn, the cameraman for the coverage, produced a copy of what he stated was the memo given him when he received the assignment from Jerry Blair, the weekend Assignment Editor. That memo, no copy of which was found in KRON's files [50], is dated February 6, 1967, states:

"Evan White:

On February 19, at 2:00 PM, the South San Francisco (remember?) library will be dedicated.

Now this facility also houses the Emergency disaster area coordination center for that section, and there is some sort of outdoor performing arts setup there also.

HPS–MG. . . .

Let's feature this for *NEWS*, and dig out a good one (Use Jensen or the like) and the contract is: James Sargen, Assistant City Manager, South San Francisco. HPS wants to make sure that the mayor of SOUTH SF is prominent in any film we do!

Let me know what and who and how!

MK"

122. Kampmann denies having written the memo although he asserts that much of it is essentially what he wrote on the orange brochure. Especially does he disclaim the penultimate paragraph. He asserts that the memo is not in his style, but his efforts to demonstrate this are unpersuasive. Thus, he claims he would not have used Evan White's full name in the routing, but he did in the memo of December 20. He claims he would not have included the full date, but he did in the memo of December 20. Evan White's recollection is that what he received was the memo.

123. In short, Kampmann contends that the memo is a forgery. If this is so, there are two possibilities. First, that someone forged it

[49] Such brochures were, in fact, circulated.

[50] The lack of a record is not significant since assignment orders are not always retained in the station's files.

before it was given to Kihn, but that possibility of that is very remote indeed. Second, that Kihn forged it in order to bolster his case. The Examiner deems this to be unlikely. Plainly, Kihn is antagonistic to Chronicle, and this bias must be considered in evaluating his testimony. Moreover, as is apparent from this Initial Decision, the evidence Kihn presented does not, in the Examiner's view, support many of the conclusions he has reached regarding Chronicle. Nevertheless, after observing Mr. Kihn and hearing him testify over many days, keeping in mind what he did not say as much as what he did, the Examiner is strongly disinclined to believe that he would falsify documents or perjure himself. Hence, it is found that Kampmann did, in fact, write the memo and has simply forgotten it.

124. In any event, the dedication was covered and 370 feet of sound film and 200 feet of silent film was used. This was enough film for a story lasting from a minute and a half to two minutes. However, the film was ruined in the lab, and all that was salvaged was 30 seconds of silent film.[51] Kampmann wrote an explanatory memo to See wherein he stated that the story might be salvaged by going back and restaging part of the tour. He closed by stating that the memo was "for your information in case those involved attempt to contact you as to why more of the dedication was not shown". See wrote letters of explanation, enclosing copies of the memo to the Mayor of South San Francisco and to Dr. Alvarez. The salvaged film was utilized on the 11:00 p.m. news on February 19, 1967, and on the "Bay Region Report" on February 25, 1967.

125. Both See and Kampmann deny that See ever said he wanted the Mayor prominent in any coverage, or that the dedication coverage was related to a CATV interest. See does acknowledge that his letter to the Mayor was motivated by CATV considerations. He explains that Chronicle's CATV application had emphasized KRON's expertise in working with electronic equipment "and we can't even develop a film". He wanted the Mayor to realize that it was not KRON but an independent laboratory which had ruined the film.

126. Coverage of events such as a library dedication are not unusual at KRON. In the three years prior to December 1, 1968 some ninety dedications, openings, and ceremonies were covered and shown including at least two other library dedications. Where political figures participate that fact has frequently been mentioned in the coverage.

127. A study was conducted of some 33 communities outside San Francisco for the period April 1, 1965 to November 1, 1968. In 28 of them Chronicle had some sort of CATV interest at some time during that period. With respect to 13 of those communities KRON carried no feature stories during the period of CATV interest, but a total of 59 stories either before or after such interest. With respect to 5 communities in which no CATV interest was ever shown a total of 57 feature stories were carried. With respect to the 28 communities in which CATV interest was shown a total of 72 feature stories were carried either before or after the period of CATV interest.

[51] This film became part of a 44-second story in which no reference was made to the attendance or participation of any individuals at the dedication.

128. Here again the Examiner is not persuaded that the record as a whole warrants a finding that CATV interests affected KRON's programming. Beyond doubt Mr. See gave instructions to pay increased attention to South San Francisco, but there is no strong evidence linking this to the CATV applications. Apparently several of See's subordinates contemporaneously asserted this to be the case, but, as noted at paragraph 107, *supra*, there is no presumption that their statements were based on knowledge, and there is a total lack of proof to that end. Both See and Kampmann deny it, and there is no direct evidence in contradiction. While such an intention might be inferred from Kampmann's February 6 memo, the inference could only be based on a conjectural choice of possible motives for See's interest in South San Francisco. If KRON is to be convicted on circumstantial evidence, the circumstances should be considerably less ambiguous.

129. Kampmann's memo of February 6, 1967, combined with See's letter of explanation to the Mayor when the film was ruined demonstrate an unusual interest in a political figure. Morover, See candidly acknowledges that the co-pendency of his CATV application was what made him more than ordinarily sensation to the Mayor's opinion. However, there remains a wide gap between the degree of sensitivity which would lead to a letter of explanation for sparse coverage and that which would actually have an effect on the programming of the station.

130. The library dedication, while hardly an event of gripping interest throughout the bay area, was the sort of event which KRON regularly covers. When political figures are in attendance that fact is noted. Thus, the fact that the dedication was covered does not, in itself, warrant an adverse inference. Moreover, the record indicates that no pattern of unusual attention to communities in which Chronicle had a CATV interest ever developed, the newsroom joke to the contrary notwithstanding. Everything considered, the weight of the evidence disfavors a finding that the fact or the method of coverage of the South San Francisco library dedication was anything more than the routine coverage of a feature story. The fact that botched coverage of the story embarrassed Chronicle's claims of technical competence in connection with its CATV application does not compel a contrary finding.

131. Another incident relating to CATV occurred with respect to a program on water pollution. KRON's program director, Richard Behrendt, conceived the idea of a program about the problem in Northern California, and assigned it to a writer, Ira Eisenberg. Film was shot, including some in Eureka, California, and Eisenberg wrote a script. While going over the script Behrendt questioned Eisenberg closely about claims that pollution around Eureka was attributable to the actions of municipal authorities and stated that he would not want to offend the city fathers because KRON might be interested in a CATV franchise there some day.

132. Both Eisenberg and Behrendt agree that Behrendt's tone was jocular when he made the remark, and neither took it for anything but a joke. The remark would have gained no measure of immortality

had it not come to the attention of Mr. Kihn who quoted it in his letter to the Commission.

133. In any event, Eisenberg's script was broadcast unaltered. Chronicle has not sought a CATV franchise in Eureka.

134. One final piece of evidence relative to CATV is worthy of mention. On October 16, 1967, subsequent to all of the activities heretofore recounted, Mr. See directed a memo to all of the employees of KRON and the cable companies. He noted that there had come to his attention incidents wherein employees of one of the Chronicle companies had deemed it their duty to take actions calculated to advance the interests of the others. He spelled out that this was contrary to policy, and that it was to stop. The record does not indicate just what incidents inspired this memo or when they came to his attention. Neither does it indicate the existence of any previous memo prohibiting such activities.

*KRON Activities re the Chronicle Newspaper*

135. The joint operating agreement executed on October 23, 1964 (para. 40, *supra*), was treated by its signatories as confidential until such time as it could be effectuated. However, by September of 1965 rumors of its existence leaked out. During the next five days details of the prospective event received increasingly wide dissemination in the area. Television stations KPIX and KGO, as well as various radio stations, carried stories on it. On September 3, 1965, San Francisco station KGO–TV carried a story on the event, and on September 5, 1965 the Chronicle published a reference to it based on a story from the New York Times wire service. During the next five days the matter received increasingly wide attention in the area. KGO and KPIX–TV, as well as various radio stations carried stories on it.[52] Nevertheless, no further stories were carried in the San Francisco newspapers, and no mention of the matter was made on KRON–TV.

136. KRON's lack of coverage was not attributable to any unawareness on the part of its newsmen. All were familiar with the events which had excited the attention of their competitors,[53] and many of them importuned their superiors for permission to cover the story. Their requests were refused with the explanation that the stories were rumors, not facts, and KRON would not broadcast the story until it had the facts. In practice this meant until the story had been confirmed by the top management of one of the affected newspapers.

137. KRON's attitude toward the story originated with William Cothran, then news director. On September 7 Cothran told Mr. Constant of the rumors circulating in town, but stated that, although the station was not in possession of the facts of the "merger", anything it broadcast would be taken as "from the horse's mouth" because of its known relationship to the Chronicle. Constant agreed, and the two took the problem to Mr. See.

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[52] The stories covered such things as meetings of unions which might be affected, and alterations on the physical plants of the newspapers involved.

[53] It would have been difficult for them not to be: the news vehicles of other stations were parked outside of KRON's studios in order that filmed stories might use the Chronicle building as a backdrop.

138. Although See was then Vice President of the Chronicle Publishing Company, his area of authority related solely to broadcast interests and he had not been informed of the pendency of the joint operating agreement. Accordingly, he called Mr. Thieriot to ascertain the validity of the rumors. He finally contacted Thieriot on September 8, but Thieriot refused to comment. Whereupon See issued the instructions which blocked the KRON newsmen from broadcasting the story until the newspapers issued a statement on the matter.

139. The story was released by the Chronicle in the early evening of September 10, and was included on KRON's 11:00 p.m. news. Constant and Cothran assisted in the preparation of the first part of the story wherein it was explained that the station had not given the matter previous coverage because it did not have the facts and would not report rumors. It was unusual for either of these two to take an active part in the preparation of stories.

140. It is found that KRON's actions during this period represent a reasonable reaction to a unique and delicate situation, rather than an attempt to suppress news. Obviously a local newspaper merger was highly newsworthy. Yet, no firm facts were available. The stories carried by competing stations were based on rumor, and must be presumed to have been recognizable as such to the listening public. On the other hand, KRON's relationship to Chronicle was common knowledge, and any story it broadcast would have been taken as based on known facts. If its stories were subsequently proven to be inaccurate it would have faced charges of deliberate misrepresentation.[54] In such a situation, where neither course was free of hazards, See acted in a reasonable manner. He went to the one source which was sure to have accurate information and which was most unlikely to mislead him. When Thieriot refused comment he decided to risk criticism for silence rather than criticism for misrepresentation.

141. It is not plausible that See's real motive, or Thieriot's, was to suppress news. The record shows that what was known was receiving extensive and increasing coverage on competing outlets. Indeed, one of the first local mentions of the matter was in the Chronicle itself. Under these circumstances neither man could rationally have believed that KRON's silence would tend to preserve the secret.

142. In February of 1966 there appeared to be the possibility of a strike against the Chronicle.[55] KRON's facilities were at that time located in the Chronicle building. The station's management feared that if a strike eventuated its own employees would honor the picket lines of the newspaper's unions. Accordingly, plans were put into effect to remove operations from the Chronicle building. The mobile remote unit was stocked with film and videotape and removed to the transmitter site. The garage at the transmitter was transformed into a studio for live news programs, and suitable lights and equipment was installed. The shooting of news film was cut back, and some projected public service programs were not performed.

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[54] The risk was real. The publisher of the Examiner stated in response to a question from a KPIX reporter, as he would presumably have stated to a KRON reporter, that there was no change contemplated in the Examiner. This erroneous information was broadcast on KPIX.

[55] The Specification Order, Issue 3, paragraph 3(a) refers to 1965. This is in error.

143. These preparations resulted in no diminution of air time devoted to news. However, certain public affairs programs were either cancelled or presented in the form of repeat programs.

144. The strike threat itself was covered. No instructions were given by management curtailing the extent of that coverage, and KRON devoted at least as much attention to the matter as did its competitors.

145. On March 30 and 31, 1965, KPIX broadcast reports of a threatened Teamsters strike against the San Francisco and Oakland newspapers. Neither KRON nor any other local television station carried the story. No witness had any clear recollection of the event, and the record is exceedingly vague on the matter, Mr. Kihn recalls that at the time he overheard Mr. Cothran say to Jerry Jensen, a news reporter, that "in a case like this, the corporate consideration is the more important one". However Kihn could not remember the context of the remark or the consequences which flowed from it, and he remembered the remark itself only after consulting his diary. Jensen also recalled the remark after seeing the Kihn diary, but he was unable to recall what, if any, instructions Cothran gave him regarding the strike.

146. Cothran does not recall the threatened 1965 strike, nor does he recall making the remark attributed to him. He never received orders from his superiors regarding the coverage of strikes, and says that if he did make the remark attributed to him, it would have been in connection with a story involving slander or something of the sort which could have gotten the station sued.

147. The record warrants no finding whatsoever as to why KRON did not cover the threatened teamster's strike in 1965. It is shown that there is frequent labor unrest in San Francisco, and that various strike threats are covered by some, all, or none of the local television stations.[56] There is no evidence tying KRON's failure to mention this particular strike threat with Chronicle's corporate interest except Mr. Kihn's diary, and neither Kihn nor anyone else can specifically recall that Cothran's purported remark was associated with coverage of a strike story.

148. On March 15, 16 and 17, 1967, KPIX again broadcast stories of a threatened teamster strike against the San Francisco and Oakland newspapers. The other local television stations, including KRON did not mention the threats. As to why there was no KRON coverage, the record is even more vague than for 1965. There is no evidence as to any order being given not to cover it, and Thieriot, See and the then News Director, Mel Kampmann, assert that they never issued instructions that this or any other labor matter was not to be covered.

149. On May 13, 1966, KGO–TV was struck by the National Association of Broadcast Employees and Technicians. The strike was settled before the day was out, and the supervisory personnel maintained operations while it lasted. KGO itself and KPIX carried stories on the incident, but KRON did not.

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[56] For example: in November 1966, KRON and KGO, but apparently not KPIX covered a picket line at the Chronicle; in February, 1966 KRON reported a strike threat against the Oakland Tribune which was not mentioned on KGO or KPIX; and in March, 1967 KRON broadcast extensive reports of strike threats against the major broadcast networks, although KGO and KPIX did not give similar coverage.

150. Mr. Kihn and Evan White testified that when White asked permission to cover the KGO strike story Mr. Cothran declined stating that, since he was not protected by a union, covering the story might jeopardize his job. They further stated that when White complained about the ruling Mel Kampmann told him that he would have to get used to that sort of thing.

151. Cothran and Kampmann deny any recollection of the incident, and Cothran denies ever believing that coverage of any story would jeopardize his job. However, the Examiner does not believe that Kihn and White fabricated the incident. The more probable explanation is that Cothran and Kampmann have merely forgotten a passing remark made some years ago, and Kihn and White remember it only because it was recorded in Kihn's diary.

152. In any event, it is not readily apparent how failure to cover a story about a strike against one of KRON's competitors would serve Chronicle's corporate interest. The explanation of the whole incident probably lies in the fact that Cothran was complying with See's memo of October 29, 1964, discussed at para. 195, *infra.*

153. On January 5, 1968 there commenced a strike against the Chronicle and Examiner which was to last for 55 days. The record does not contain evidence purporting to show that KRON's coverage of the strike was biased. However, there is evidence relating to specific incidents which occurred in the course of the strike.

154. On the day the strike started Mr. Kihn and reporter Ed Hart were assigned to see what was happening. On arriving at the Chronicle building they found pickets carrying signs stating that they were informational pickets from Los Angeles where the Hearst newspaper was being struck. In addition, a large number of people, at least some of whom were known to be Chronicle employees, were milling around. The Chronicle employees were observing the picket line. Hart talked to Mr. Smith of the Printing Company, Mr. Thieriot, Mr. Charles Raudenbaugh, a Chronicle reporter whom he knew to be a spokesman for the Newspaper Guild, and possibly to Mr. Hearst. Some of these interviews were filmed, but no one knew exactly what was going on. Accordingly, Hart called back to KRON seeking further instructions.

155. Evan White told Hart to film the pickets and get their names.[57] He was to find out if they were actually from Los Angeles as they claimed. Kihn recalls that he wanted to film San Francisco reporters who were honoring the picket line, but Hart directed him not to.[58] However, Hart made clear on the record that, except as heretofore noted, he had no instructions as to how the story was to be covered, and he covered it as his professional judgment dictated.

156. The story appeared on the 6:00 p.m. news that day. Hart wrote most of it. He was under no instructions to slant pro-management, and he believes it was an impartial story.[59] Hart himself saw nothing

[57] White recalls getting the instructions from Kampmann who told him they originated with See. Kampmann has no recollection of the incident.

[58] KRON's reporter-photographer teams operated with the reporter in charge. Although photographers exercised wide discretion, the extent of that discretion was in the hands of the reporter who had authority to order that certain things would or would not be filmed.

[59] The only labor spokesman interviewed on the program was one of the pickets. However, this was because Hart's attempts to obtain statements from local labor spokesmen prior to air time were unsuccessful.

unusual in the coverage of the story. It was his opinion, shared by other reporters who testified, that the filming of pickets is a conventional way of covering strike stories.

157. The Examiner is unable to draw any inference unfavorable to KRON from its coverage of the opening of the strike. Not only does the reporter who did the story deny that he slanted it, or was told to do so, the record indicates that the presentation of the story was in no way unusual. Moreover, the possible evil motive in filming pickets is not readily apparent. Picketing is about as nonsecret an activity as one can undertake. Public attention is the point of the whole thing, and KRON seems merely to have broadened the public who were acquainted with the incident. It is found that Mr. Kihn disagreed with the professional judgment of his superior, Mr. Hart, as to how the story should be covered, and, on little or no evidence, attributed Hart's position to an attempt by management to slant the news.

158. On January 14, 1968, Mr. Kihn filmed a Mailer's Union news conference. The film was not shown on the station. Mr. Constant and Mr. Kampmann explained that, because it was impossible to get the publisher's counterstatement on the same day, the story was unbalanced and was not carried because it might violate the Fairness Doctrine. By the next day it was stale news.

159. Standing alone KRON's explanation would be suspect. The Fairness Doctrine does not, of course, require that opposing views always be presented on the same newscast or even on the same day. However, since this was only one of many incidents occurring during a long strike, and, as noted at para. 164, *infra*, overall coverage was fair, no harsher finding is warranted than that an error of judgment was made in the application of the Fairness Doctrine.[60]

160. On February 2, 1968, Mr. Kihn and reporter Jack Bates covered a meeting of members of the striking unions. Bates restrained Kihn from shooting as much film as he would like, and Kihn says Bates told him that this was because they were under instructions to be "circumspect" in their coverage of the meeting. Bates denies making the statement, or that he was under any instructions at all regarding how to cover the story. He restrained Kihn from shooting certain of the speeches made because he did not deem them sufficiently newsworthy. The record provides no basis for any finding other than that Kihn again had a disagreement with a reporter as to the news value of an incident, and, on little or no evidence, attributed the reporter's position to limiting instructions from his superiors.

161. Evan White stated that he was instructed by Mel Kampmann not to use the words "merger" or "monopoly" in news stories regarding the strike. Reporter Art Brown recalled receiving "something like" such instructions from Kampmann, although he disclaimed having been specifically restricted from using the words. Three other KRON reporters or newscasters who worked on news stories regarding the strike did not recall any such limitations being put on their stories.

[60] The Fairness Doctrine is simply stated. The Examiner is unacquainted with anyone knowledgeable of the controversies which have arisen under it who contends it to be simple of application.

162. Mr. Kampmann denied having given such instructions, or having been told to do so by his superiors. However, he acknowledged that while he was never told to refrain from using the words "merger" or "monopoly", either Mr. See or Mr. Constant had explained to him just what the joint operating agreement was and why it was not a merger or monopoly. He passed this explanation on to some of his subordinates.[61]

163. Kampmann's testimony reconciles the apparent conflict in the testimony of the reporters and newscasters. Plainly, he did not intend to preclude use of the words "merger" or "monopoly" or he would have either written a memo to his whole staff or issued verbal instructions to all of the people working on the story. However, he did pass on his understanding of the situation to his assignment editor and one of his newsmen. They are not to be faulted for deciding that if their boss didn't think the joint operating agreement was a merger or monopoly those words should not be used in their stories. What the superior said was a helpful explanation: what the subordinates heard was a limiting instruction. Such misunderstandings are not uncommon, and no basis is provided for a finding that news was suppressed.

164. As noted in the order of designation (Issue No. 3, para. 3(c)), KRON gave substantial coverage to the strike, and more time was devoted to the union's position than to management. Mr. Charles Raudenbaugh, a Chronicle reporter who served as publicity chairman for all the unions involved, regarded KRON's coverage of the strike as neither better nor worse than that of the other local television stations.

165. Starting on January 15, 1968, and continuing for the duration of the strike, KRON expanded its news presentations. From 6:30 to 8:00 a.m. it broadcast the "Sunrise Report", an informal program of previous day material which still had news value plus newsworthy overnight material. The program combined both "hard" and "soft" news; serious events as well as those appealing to more specialized interests. In addition, news bulletins became more common throughout the day. At the conclusion of the strike this expanded coverage was cancelled.

166. The Specification Order contains references to various other incidents representing possible examples of news slanting. Each will be discussed. Since they present no discernible pattern, they will be discussed more or less in the order in which they appear in the Specification Order.

167. Based upon Mr. Kihn's December 22, 1968 letter the Specification Order noted that it is "further alleged that in preparing a 1965 news item on Synanon, an organization of former drug addicts, the former KRON news director stated that "we don't want to give these people any credence". While the relevance of this matter is not readily apparent[62], the record indicates that the purported quote does not fairly represent KRON's actual position relative to this organization.

[61] On cross-examination Kampmann conceded that he "may" have told a somewhat different story to Bureau counsel at a preliminary interview. However, the concession that a witness "may" have made contradictory prior statements is entitled to no weight absent some evidence that he did. While the Examiner appreciates the problem which confronted Bureau counsel, he cannot substitute that understanding for the record in formulating findings.

[62] Kihn did not think this matter affected KRON's corporate interest. He included it in his letter because he deemed it representative of what he considers news management.

168. The record indicates that the man Mr. Kihn asserts made the remark was not the news director, but an employee who subsequently became news director.[63] That is to say, if he made the remark, he lacked the authority to see that his viewpoint prevailed. In any event, it appears that KRON has devoted favorable attention to Synanon and its activities. The director of the organization was of the opinion that KRON has cooperated with it, and has been fair and accurate in the coverage of its activities.

169. Alfred Berglund has been a documentary writer at KRON since 1964. The concepts for the documentaries that Berglund writes stem from many sources, and one that was suggested by Mr. See was on the subject of venereal disease.

170. Berglund researched the subject and evolved a presentation based on the premise that an increase in venereal disease has accompanied an overall increase in sexual promiscuity; and that such promiscuity results, in part, from "open and blatant" appeals thereto in magazines, television shows, etc. He proposed to demonstrate this theory by showing on the program pictures of print media ads and television commercials which he believed appealed to promiscuity. Mr. See, in a conversation with Berglund and in a memo asked to see examples of which television shows Berglund had in mind, and directed that television and radio presentations be left out because "only the cuckoo fouls its own nest."

171. See explained that his motives were entirely pragmatic: it was most doubtful that any advertiser would authorize the use of its commercials to demonstrate Berglund's point. He had no objection to the program presenting a general criticism of the sex orientation of television, and, in fact, the program as broadcast contains remarks to that end.

172. After the program was prepared it was reviewed by a committee consisting of Messrs. Constant, Phillips and Behrendt. This committee recommended the deletion of certain portions of the show which depicted magazine ads as sex-oriented and which identified the magazines in which they appeared. This recommendation, which was accepted, was based on the specific advice of counsel who was consulted on the matter.

173. This incident does not warrant an adverse finding. The unauthorized use of specific advertisements to derogate the motives or methods of the advertisers presents obvious risks under both copyright and libel laws. A broadcaster does not impermissibly serve his own interest if he declines to present programming which is likely to buy him a lawsuit.

174. The hearing explored KRON's presentation of a local controversy on subscription television. In the election of November, 1964, a Proposition appeared on the California ballot relating to subscription television. KRON did not editorialize on the matter or take any public position.[64]

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[63] Kihn testified Kampmann made the remark. However, in 1965 Cothran was News Director, and Kampmann did not take over that position until later.

[64] Seven years earlier, on September 20, 1957, KRON issued a press release opposing the broadcast type of subscription television. This release was not broadcast on the station.

175. However, the station refused to accept advertising either for or against the Proposition. This refusal was pursuant to a policy of not accepting advertising on any controversial ballot Proposition in order to avoid last-minute Fairness Doctrine calls for time by opponents which might disrupt the station's program schedules. The refusal to accept advertising resulted in a complaint to then-Chairman Henry of the Federal Communications Commission by a proponent of subscription television. As a result the Commission reviewed the matter and on October 16, 1964 ruled that KRON's actions were "well within the wide discretion which the licensee had in making program judgments to meet the needs and interests of his area."

176. However, the station did not ignore the controversy. Between October, 1963 and August, 1964 it carried twelve news stories. The stories were balanced between events favorable to each side. On October 25, 1964 KRON–TV broadcast in full a 47-minute debate between the leading proponent of subscription television and a spokesman for a group opposed to the idea.

177. Thus, the station devoted substantial air time to the matter and afforded both sides a fair opportunity to be heard. This record furnishes no basis for a finding that the Commission erred in its original determination that the licensee acted within its permissible discretion, or that its programming decisions relative to subscription television were dictated by self interest.

178. In addition to the foregoing incidents, all of which were discussed in the Commission's Specification Order, the record explored various other happenings purportedly demonstrating that KRON programming was dictated by its self interest.[65]

179. On December 5, 1963, the San Francisco newspapers carried a story regarding an American Cancer Society release on a study of cigarette smoking. Mr. John Chambers, then a KRON newswriter for the 11 :00 p.m. news, thought the story newsworthy, and wished to carry it. However, he knew that there was a cigarette commercial scheduled during the program, and he was aware of a policy to drop airline commercials from news shows mentioning air crashes.[66] He thought the situation comparable, so he consulted Mr. Cothran, then News Director, with a recommendation that the cigarette commercial be dropped from the show.[67] Cothran told him to cut the story, not the commercial.

180. Cothran had no recollection of the incident. KRON did broadcast the story as part of the network news, but did not include it on its own news show.

181. A finding is warranted that Cothran's decision was motivated by a desire to protect his employer from embarrassment with one of its advertisers. However, there is no evidence that this was anything other than an isolated instance unrelated to any policy at the station, or that Cothran's action was more than a lapse of judgment.

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[65] See footnote 11, of the Commission's Memorandum Opinion and Order released October 17, 1969.

[66] The policy is that of the airline advertisers, and is industry wide.

[67] If Chambers had decided to carry both the story and the commercial he would not have been required to consult Cothran. He left the decision to his superior only because he thought it might be appropriate to cut the commercial, and he did not have the authority to do that.

182. The Chronicle sponsors an annual July 4 fireworks display in San Francisco, and KRON annually covers it. In 1967 then Assignment Editor Evan White decided not to cover it because of a logistic problem. The failure of coverage was noted by a viewer, who called Mr. Thieriot to inquire the reason. Thieriot, who hadn't known that the display wasn't carried, called KRON to find out why. Thereafter, the event became a "must-go".[68]

183. The Examiner is unable to draw any inference from the incident. There is no dispute that the event is newsworthy, drawing very large crowds in San Francisco, as do similar events in other cities. Television coverage of these displays is so conventional as to be traditional, and a failure to cover is somewhat unusual. There is no reason to believe that Thieriot's inquiry was anything more than an attempt to ascertain why such an event was not covered. That his interest in the matter would, predictably, influence his subordinate's decisions as to future coverage does not detract from the fact that the event is newsworthy or tend to demonstrate that he sought unwarranted publicity for a Chronicle sponsored activity.

184. For some years the Chronicle has sponsored an annual domino tournament for the benefit of a local Boys Club.[69] In 1968, due to the strike heretofore noted, the Chronicle was unable to promote the event. The lack of publicity was a matter of concern to Hubert Buell, editorial promotion manager of the Chronicle, whose job it was to recruit entrants, solicit prizes and secure publicity for the affair. Accordingly, Buell asked his boss, Charlies Thieriot, if he could ask KRON to pinch-hit for Chronicle in publicizing the tournament.

185. When Thieriot consented Buell talked to the appropriate people at KRON and secured their pledges of cooperation. However, Buell took the whole thing much more seriously than did his contacts at KRON who didn't give the matter very high priority. Things went wrong. People who had donated prizes did not receive appropriate recognition; KRON's camera crew did arrive in time to cover the Mayor's activities, although he had been told his participation would be publicized; and Buell's phone calls to KRON produced no results.

186. At this point Buell became provoked and threatened KRON personnel with adverse reactions by Mr. Thieriot. As a result everyone involved at KRON wrote memos explaining why the difficulties were not his fault, and arrangements were made to film the award of the first prize in a manner calculated to publicize the donor.

187. Here again, no significant adverse finding is warranted. The Chronicle was interested in a charity, and when its inability to publish prevented it from lending its usual support Thieriot authorized an attempt to substitute the facilities of KRON. When KRON's performance on the matter proved less than satisfactory, the Chronicle liaison man lost his temper, exceeded his authority, and acted tactlessly. However, since the KRON people involved could not be certain of the real extent of Thieriot's interest, and his ultimate authority was ap-

[68] An industry term originated on newspapers. It means exactly what it sounds like.
[69] Domino tournaments are actually of substantial interest in the area. Television stations other than KRON have covered Chronicle's tournament, and KRON has covered other tournaments.

parent, they over-reacted in an attempt to placate Buell. There is no evidence that any Chronicle corporate interest was served except in the most indirect sense, or that the incident represents the implementation of any policy. No more is involved than the unauthorized invocation of the authority of the big boss, and of an entirely understandable reaction thereto.

188. On April 2, 1966, thirteen minutes of the program "Bay Region Report" was devoted to descriptions of four possible sites for a new state college campus in Contra Costa County. Each of the sites received approximately equal attention. The reporter who worked on the story suspected that it was broadcast to assist in the sale to the state of one of the sites which was owned by a corporation, a director of which is the Executive Editor of the Chronicle. The record totally lacks any evidence tending toward such a finding. It shows no more than that the land was so owned, and that the reporter thought more time was devoted to the story than it warranted. All else is conjecture.

189. An attempt was made to show that an October 4, 1966 story relating to a used clothing and furniture store in Napa, California was un-newsworthy, and was carried only because the store was operated by an organization in which Mrs. Harold See was interested. The reporter who covered the story testified that he had so concluded based upon the "opinion" of the cameraman who worked the story with him. There was no other evidence. The Sees live in San Mateo, not Napa which is over 50 miles away. Mrs. See is not associated with any organization in Napa.

190. The Dairy Council of California is a quasi-governmental agency operating under the control of the California Department of Agriculture. Its function is to sponsor the use of California dairy products. In the spring of 1967, the Dairy Council approached KRON and asked if the station would be willing to produce a panel show boosting the use of dairy products. The station agreed, and the Dairy Council secured a panel which included Thomas Brewer, a medical doctor. The show had an ad lib discussion format, and Dr. Brewer turned out to be not exactly what the Dairy Council had in mind. He asserted that soft drinks, candy bars, snacks, etc. were nutritionally valueless, and he impugned the motives of their manufacturers. He condemned the advertising of such products, and attacked the use of cigarettes.

191. The show was reviewed by a panel representing KRON and the Dairy Council and was found unsatisfactory. Dr. Brewer's remarks did not fit the original concept of a program showing how dairy products fit into a balanced diet, and the Dairy Council was concerned that it might violate Section 745.2 of the California Agricultural Code which prohibits industry councils from disparaging the lawful products of a competing industry. Accordingly, the show was redone with new panelists, and was broadcast on April 8, 1967.

192. While the decision to remake the program was basically that of the Dairy Council which paid for the production of and owned the program, KRON concurred. The concurrence avoided embarrassment for the station since it eliminated the need to broadcast attacks on products which were advertised on the station. Nevertheless, the Examiner

is not convinced that a finding is warranted that this was the governing consideration. It was apparent when Dr. Brewer testified that he is a man of strong convictions strongly expressed. His presentations tend to emphasize his conclusions rather than his reasons therefor. While the script of his performance is not available, it is understandable if his criticisms were so phrased as to appear intemperate. No adverse finding should be inferred from a reluctance to air such a program.

193. On October 1, 1968 the International Brotherhood of Electrical Workers struck KRON. The newsmen on duty produced a story on the strike, and contacted Mr. Constant to get management's position. Constant consulted See and they agreed that, since the station was being run by supervisory personnel, the strike was not newsworthy and the story should not be run. The newsmen on duty argued that the event was, in fact, of news interest, and See and Constant deferred to their judgment. For the remainder of the strike management did not make any suggestions as to how the story should be covered, and Constant, who served as on-the-air announcer, did not make any changes in his readings of the strike stories prepared by the newsroom.

194. Educational Station KQED conducts an annual auction of donated merchandise in order to raise funds. Since 1961 KRON has broadcast short promotions for the auction. In 1968 Mr. See wrote a memo about such promotions stating that "simplest way we can maintain a modicum of PR and still bury the whole thing is to give them some time on Community Circle but not on the news—so please proceed toward that end."

195. Two KRON memoranda were the subject of evidence relating to whether KRON news was tailored to suit its own interest. On October 29, 1964, Mr. See wrote that any:

"stories relating to the 'public relations image of any radio or television station in the 50 states and their parent companies and/or networks or stories relating to the individual acts of officers, directors, or employees of the foregoing named organizations' should be brought to the attention of Messrs. See or Constant before being broadcast, or in their absence, Mr. Cothran should approve or disapprove the story. . . ."

The memo concludes by stating that the memo does not apply to any publishing company "except, of course, The Chronicle Publishing Company". On April 6, 1967, Mr. Kampmann wrote:

"You are all aware of company policy regarding the reporting of labor strife within the broadcast industry and/or local newspapers.

"However, it has become apparent that some of you do not understand the full intent of this policy.

"It is therefore mandatory that any story relating to broadcast industry labor problems and/or local newspaper problems be cleared with the News Director BEFORE airing.

"In case there is no contact possible with the News Director, the Program Manager or Production Manager should be contacted. If you cannot get clearance for some reason from the above then DO NOT RUN THE STORY."

196. See explained his memo as having been specifically motivated by a KRON news story of October 27, 1964, relating to a picket line at Station KGO. See had been called by the General Manager of KGO with a complaint about inaccuracies in the story. Since See was then concerned about what he regarded as other incidents of



109-038—73——8

laxness in the newsroom, he issued the memo to promote accuracy in stories concerning that with which he was personally familiar.

197. Kampmann issued his memo after reviewing a KRON story regarding an AFTRA strike against the major networks. He regarded it as being biased in favor of the union position. He knew that some members of the KRON news staff were members of AFTRA, and he feared that their membership might affect their objectivity on stories relating to labor strife in broadcasting. Hence, he regarded it as desirable that such stories be reviewed by persons unlikely to share the bias which he feared. Neither See nor Constant was aware of the issuance of Kampmann's memo.

198. Mr. White asserted that the existence of these memos resulted in self-censorship by newsmen. However, the record does not identify any story that was not covered, or that was covered differently, because these memos were extant.

199. In December, 1969, the producer of KRON's local news program read a news wire story about Christmas trees being flown to Hawaii. He checked around and ascertained that United Air Lines was flying some of the trees. Since a reporter was at the airport on another story, he was instructed to contact United Air Lines and shoot some film. The story appeared on the local news story of December 10, 1969. A United Air Lines commercial was on the same show. The producer was aware that the other air lines must have been flying trees, but he didn't know which ones. He denied that the presence of the United commercial on the show influenced his selection of that air line for the story. There being no evidence whatsoever that KRON had a policy of giving advertisers free plugs, there is no reason to doubt him.

*Issue No. 4: Quality of Past Programming.*

200. KRON was afforded an opportunity to demonstrate unusual merit in its past programming in mitigation of any unfavorable findings on Issues 2 and 3. It submitted voluminous exhibits to that end. The accuracy of these exhibits has not been challenged, and the following findings are based thereon.

201. KRON–FM is a good music station. During the 1967 composite week 83.6% of its time was devoted to such music. The remaining time was devoted to news and public affairs programs.

202. KRON–TV's 1968 renewal application shows that during the composite week non-entertainment programming occupied 24.94% of its broadcast time broken down as follows: news 11.64%; public affairs 6.01%; and other 7.29%. Local and regional news occupied 35.04% of its news time. It did not exceed its stated maximums of commercial time on any occasion during the composite week.

203. Since 1965 KRON has maintained a full-time staff for the production of documentaries. A number of documentary series have been produced. One, entitled "Assignment Four" has, since February, 1960, resulted in the production of 266 separate programs which were broadcast a total of 397 times, including reruns. The program presents varied matters of interest to Californians and residents of the Bay Area. Typically the programs are one half hour in length, although some have run longer. During the last license period 76 first runs and

36 reruns of the series were broadcast, the programs being presented in prime time.

204. During the last license period KRON had produced by a commercial firm a series entitled "California", a photographic history of the state. A total of eight one-half hour programs were shown in 1968 and rerun in 1969.

205. In addition to its regular documentaries, the station produced seven special documentaries during the last renewal period. A variety of unrelated subjects were covered.

206. The station presents a number of public service program series. They include: "Youth Inquiries", a series wherein a panel of area young people question experts on various subjects. The station produces the series, and during the last license period 39 first-runs and 29 reruns of the half-hour series were presented. "Community Circle" has been presented for one half-hour weekly since 1961. It offers local organizations an opportunity to publicize and promote matters which interest them. During the last license period 134 first-runs and 12 reruns of the show were presented. "Speak Out" is a weekly half-hour show whereon representatives of conflicting viewpoints discuss controversial matters in the presence of a moderator. During the last license period 99 first-runs and 25 reruns were broadcast. "Colloquy" was a 77 program series broadcast between April, 1964 and July, 1967. The program involved discussions of great literature by a panel of three scholars representing different disciplines. "Panorama/Jobs" and "I Want to Go to Work" are different formats of a program featuring disadvantaged workers who wish to make their skills and availability known to potential employers. The concept was first attempted in 1967 and continues to the present. A total of 20 half-hour and 89 five-minute programs have been shown. "University of Michigan" is a series of 30-minute programs presented on Saturday and Sunday. Prepared by the University, they offer continuing non-credit education in a diversity of subjects. In the last license period 228 first runs and 125 reruns were shown. "Profile" is a study of man and his works prepared by San Diego State College. During the last license period 191 first runs and 233 reruns of the series were presented in half-hour programs. "Seminar Four" was a series of lectures on English literature presented by a Professor of English at San Francisco State College. A total of 50 half-hour programs were presented between July and September, 1967. "San Francisco Junior High School Debates" is a half-hour program presenting the finals of a 16 school debating contest. Three half-hour programs were presented in the last license period. "Folklore", conducted by a Professor of Anthropology from the University of California at Berkeley was a series of eight half-hour programs during the last license period. Various aspects of folklore were explored. "Wide Wonderful World" is a travel series of half-hour programs. During the past license period a total of 252 first-runs and 79 reruns were shown during prime time. "On Stage" is a 30-minute program dealing with Bay Area theatrical affairs. During the last license period a total of 69 first-runs and 2 reruns were shown. "Information Four" was a series of daily 5-minute programs presented between March, 1966 and January, 1967 during

which representatives of the San Francisco Library demonstrated how their facilities could be used to answer viewers' questions. "Operation Alphabet" was a series of some 100 half-hour programs designed to teach functionally illiterate adults to read and write. In the 1962–66 period the series was presented three times. "Dressing by Design" was presented during the last license renewal as a series of five half-hour programs devoted to the design and making of clothes. "Panorama" was a live half-hour program with a format of appearances by local talent and discussion of controversial affairs. During the last license period 112 programs in the series were presented.

207. Agricultural series have included "Greenthumb" which is a half-hour program devoted to Bay Area gardening. During the last renewal period 139 first runs and 10 reruns were shown. "White Collar Farmer" was a series of half-hour programs presented between April, 1958 and June, 1967. An agricultural authority from the University of California presented a series of guest experts on various aspects of farming. "Agriculture U.S.A." is a half-hour program devoted to various topics of interest to agriculturists. During the last renewal 115 programs were broadcast. "Across the Fence" is a half-hour program produced by the USDA and directed to both farmer and consumer. A total of 153 programs in this series were shown during the last renewal. "Farm Dateline" is a daily 5-minute report on farm market quotations, etc. A total of 774 presentations were made during the last license period.

208. Religious programming has included "Heritage", a half-hour show presented every week in cooperation with the Catholic Archdiocese of San Francisco. "Journey Into Judaism" was a weekly half-hour show presented between September, 1965 and May, 1966 in cooperation with the Board of Rabbis of Northern California. "Selichot" was an annual telecast of that Jewish ceremony. "Meditation" is a conventional 5-minute sign-off program. "Davey and Goliath" was a 15-minute animated show directed to children every Sunday from 1963 to 1967 by the Northern California/Nevada Council of Churches. "Dialogue" was a series of half-hour ecumenical discussions presented between April and July, 1967. During the last license period special programs were presented at the request of the Church of Jesus Christ of Latter-Day Saints, and the United Methodist Church. "Problems Please" was a discussion of ethical problems by representatives of various faiths. During the last renewal a total of 75 first-run and 22 reruns of this half-hour program were broadcast.

209. During the last renewal period the station produced more than 20 special programs not part of any regular series. Many of these centered upon events of interest in the area. In addition, more than twenty recorded programs of the same general type were also presented.

210. KRON regularly schedules staff-produced news programs Monday through Friday for 5 minutes at sign-on; from 8:25 to 8:30 a.m.; from 6:00 to 6:30 p.m.; from 11:00 to 11:30 p.m.; and for 5 minutes at sign-off. On Saturday and Sunday there is a 5-minute sign-on show; from 6:00 to 6:30 p.m.; from 11:00 to 11:30 p.m.; and for 5 minutes at sign-off. In addition, special programs are produced from time to time on events of particular interest.

211. The station has directed attention in a substantial number of programs to matters of particular interest to members of minority groups in its service area. Included have been programs directed to viewers of Spanish derivation, to Negroes, to Chinese, to Japanese, and to others.[70] The facilities of the stations have been used in cooperation with various civic, charitable, educational, business and similar organizations.

212. KRON called a number of witnesses representative of the entire spectrum of groups and organizations throughout the area.[71] Their testimony presented a common theme of station understanding of their objectives and cooperation in effectuating them. They further demonstrated that KRON's public service series heretofore described genuinely serve as outlets for expression by the various groups in the community.

213. This viewpoint was not entirely unrebutted. A former host on the program "Speak Out" believed that, although the program was supposed to present controversy, it avoided genuinely controversial topics and panelists. However, he was unable to recall any topic recommendation of his which was rejected by management, and acknowledged that if panelists seem too bland, it may have been, in part, his own responsibility for failing to draw forth their opinions. A former Director of Women's Community Affairs on KRON testified that if a spot had already been sold that time was no longer available for public service announcements. It was her impression, although she had no statistics, that public service spots were uncommon during prime time.

*Issue No. 5: Investigation of Complainants*

214. On November 6, 1968, KRON's Washington counsel first became aware of the communications received by the Commission from Mr. Kihn and Mrs. Streeter. They immediately telephoned KRON's general counsel, Mr. Robert Raymer of the San Francisco law firm of Cooper, White and Cooper. Raymer promptly advised See, and on November 7 he took to See a copy of Mrs. Streeter's complaint and Mr. Kihn's letter of September 8, 1968 which had been mailed him by Washington counsel.

215. Raymer discussed the matter with his senior partner, Shelden Cooper, and they agreed to recommend to See that an investigation be conducted. See concurred. Mrs. Streeter's complaint had been forwarded to the Commission, along with copy of Mr. Kihn's letter, by Mr. Charles Cline Moore, a San Francisco attorney who had also filed a civil anti-trust suit against KRON, on behalf of Mrs. Streeter. The language of Kihn's letter suggested that he might be acting as spokesman for other KRON employees. For these reasons See and the KRON lawyers suspected that Kihn, Streeter, Moore and unknown KRON employees might be acting in concert for an undetermined purpose, and an investigation seemed appropriate to them.

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[70] Representatives of Spanish and Chinese speaking groups appeared as public witnesses to discuss the programming needs of their groups. Another public witness expressed his views on the need for black-oriented programming to be prepared by Negroes. The Commission's attention is directed to the comments of these witnesses.

[71] Some 100 witnesses were noticed. After hearing 16 of them, representing diverse interests, the Examiner halted the presentation of further witnesses in an effort to curb the growth of an already unwieldy record. He did so not because he thought the testimony of further witnesses unimportant, but because he believed that KRON had made its point.

216. On November 7 Raymer called Michael Hamel Green, a partner in the investigative firm of Neilson and Green. Raymer and his law firm had used Neilson and Green several times previously on behalf of other clients, and he regarded them as the most able and discreet in San Francisco. Raymer retained Green to conduct an investigation into the backgrounds of Kihn and Streeter, and told him to contact See for the necessary preliminary data.

217. Green went to See's office on the afternoon of November 7. After ascertaining See's knowledge and suspicions, Green recommended a general background investigation which involved checking all available public records. He also recommended surveillance. Green was not shown a copy of Kihn's letter to the Commission, and neither then nor later was Green directed to ascertain the validity of Kihn's charges.

218. Raymer had advised See that, in view of KRON's position as a licensee of the Commission to which Kihn had complained, it would be inadvisable to take any action against him on account of that complaint. This view was communicated to Green, and he instructed his employees to be circumspect in their activities and to avoid alerting Kihn. Secrecy was also maintained at KRON. See told no one other than Thieriot, and later Constant, that the investigation had been undertaken, and the files relating to the matter were kept in a locked cabinet in See's office.

219. The background investigation which was undertaken was done under subterfuge. That is to say, when the custodians of the records asked for the identity of the person checking or his reason for wanting the information, they were given incorrect answers. The purpose of this is to preclude the possibility that the custodian will alert the person under investigation of the fact that he is being investigated. The technique is a common one, and the Chief of the San Francisco police, who testified, asserted that he employs it himself on occasion.

220. Surveillance of Kihn commenced immediately. It was conducted on November 9–11 and 15–16, December 18–20 and 23–24, 1968, and January 16–17 and March 8–11, 13–14, 18–27, 1969. The surveillance ordinarily began between 6:00 and 7:00 a.m. when an automobile would park on Mr. Kihn's street some 300 feet from his house.[72] Another car would park 2 or 3 blocks away, the two being in radio contact.[73] When Kihn drove off the first car would alert the more distant vehicle, and Kihn would be tailed to his destination. He was not followed closely, and the investigators were under instructions to lose him rather than alert him. However, when circumstances permitted, the detectives would approach quite close and attempt to eavesdrop his conversations. Ordinarily the surveillance was conducted by men in two cars, but on occasion as many as five were used.

221. In addition to following Kihn, the surveillance teams recorded the license plate numbers of the vehicles of persons with whom Kihn

[72] Mr. Kihn lives in a neighborhood of well separated houses on narrow, winding streets. Hence, it was difficult to find a spot close enough to observe the house where the street was wide enough to park, and where the car would not be easily seen from Kihn's home. As a result the surveillance car was compelled to park in the same place each morning.

[73] Before taking position each morning the investigators would report their presence to the local police. However, they would not disclose who they were investigating.

came in contact. These numbers were checked through the Motor Vehicle Bureau to ascertain the identity of the owners.

222. The surveillance was discontinued after five days in November. In December See asked Green to resume it. His reason was that he knew that KRON was about to file its response to Kihn's charges, and he wanted to see who Kihn would contact when he received a copy of the reply.

223. Another flurry of surveillance occurred in March. There were reports in the trade press that an application would be filed in competition with the KRON renewal. At about the same time the editor of an irregularly published San Francisco newspaper came to the KRON offices to inspect the station's renewal application. See and Raymer suspected there might be some connection between Kihn and the potential competing applicants, and they wanted him followed in order to investigate the possibility.[74] For the same reason, the editor who had inspected the renewal application was also placed under surveillance. Although Kihn's surveillance was intended to be continuous, it was discontinued between March 15 and 17 because the investigators feared he might have come to suspect their presence. He was left alone in order that he might become reassured.

224. In fact, Kihn was not aware that he was being followed. However, the matter was not a secret to his neighbors. As noted, the surveillance cars were required to park in the same spot every day. Occasionally the detectives attracted notice by playing their radios too loud or littering the street with paper bags, etc. Hence, by early March Kihn's neighbors knew they were there, and twice complaints were made to the police. However, none of the neighbors discussed the matter with Mr. Kihn.

225. It was not until March 27, 1969, that Kihn became aware that he was being followed. On that day there was a malfunction of the two-way radio, and the investigator in the car parked close to Kihn's home could not advise his colleague that Kihn had driven away. Hence, he was obliged to follow Kihn himself. Kihn noticed the car behind him and took to an irregular route to ascertain that he was actually being followed. He made a U turn, and drove along a little traveled, narrow, winding, mountain road where any car behind him would be very obvious. When he was satisfied that he was being followed, he returned to Mill Valley where he resides, and notified the police.

226. The surveillance team immediately reported to their office that Kihn had discovered their activities. The investigative firm recommended surveillance be discontinued, and See and Raymer concurred.

227. Shortly after this matter was designated for hearing, KRON's San Francisco counsel again discussed the affair with Neilson and Green. It was assumed that Mr. Kihn and Mrs. Streeter would be witnesses, and it was deemed desirable to discover information which could be useful in cross-examining them. This decision was made by

[74] On April 25, 1969, the attorney in this proceeding for Mr. Kihn and Mrs. Streeter filed with the Commission a Petition for Intervention by Bay Area Television, Inc. The petition stated that Bay Area intended to seek a license on KRON's frequency as soon as an application to that end could be properly filed. The Petition to Intervene was denied by the Examiner's order released June 5, 1969. The record contains no indication that either of the Complainants has any connection with Bay Area.

the attorneys, and neither See nor anyone else on KRON's management participated in it.

228. The method of investigation selected was personal interviews under subterfuge. That is to say, persons who might be presumed to have knowledge of Mr. Kihn or Mrs. Streeter were interviewed about them, but the reasons given for the interview were false. The subterfuge used during these interviews was that the subject had applied for employment and a check was being made by the potential employer.

229. Mr. Green selected the persons to be interviewed. He picked people whom he deemed unlikely to inform the subjects that the investigation was being conducted. The questions asked were wide ranging. They included inquiry as to the subjects' opinions and aspects of their personal lives. More than 50 people were interviewed.

230. Mr. Kihn discovered that the interviews were being conducted in April, 1969. At that time he learned that his former wife, and the former husband of his present wife had been approached. At about the same time Mrs. Streeter learned that her former mother-in-law and a neighbor had been interviewed.

231. At the end of April or early May, 1969 Mrs. Streeter ran into an acquaintance at a party. This gentleman, who was a reporter and assistant editor of the Chronicle, told her that two investigators were tailing Kihn, and one was following her.[75]

232. The technique of undercover contact was also employed at this time. As in subterfuge interviews, the detective conceals his identity and purpose. However, instead of a direct interview about the matter in which he is interested, the investigator attempts to establish a personal relationship through which he can approach the subject indirectly. Undercover contacts were made with Mr. Kihn and his wife, a close friend of theirs, and with the editor who had checked on KRON's renewal application.

233. As a result of the undercover contacts it was learned that Mr. Kihn was seeking help in prosecuting his charges from an organization he understood provided legal assistance or funds in broadcast cases presenting important issues. On the basis of this information KRON's lawyer contacted the organization and asked for an opportunity to present KRON's side of the matter. He was informed that the organization was not interested in assisting Kihn so there was no need for him to make a rebuttal presentation.

234. Various authorities on police work expressed opinions as to the legitimacy of the investigative techniques employed. They included a former Assistant Director of the FBI, the present Chief of the San Francisco Police, and a man who has been a private investigator in the area for some 20 years. All agreed that what had been done was customary in such cases; that the techniques were suited to the investigatory problems; and that the manner of their implementation was reasonable. A prominent San Francisco attorney and a local investigator, each unconnected with KRON, testified that the firm which was selected to conduct the investigation, Neilson and Green, enjoys a reputation for honesty and integrity.

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[75] In fact, by this time the surveillance of Kihn had been discontinued, and Mrs. Streeter never had been followed. The reporter's information had come through a news source, not through his position at Chronicle.

235. The investigation was discontinued in June of 1969 following the pre-trial depositions of Mr. Kihn and Mrs. Streeter. A total of 1,426½ hours were devoted to the case by the firm of Neilson and Green.

CONCLUSIONS

*Issue No. 1: Concentration of Control*

236. Chronicle interests add up to a powerful voice in the San Francisco area. They include one of the two daily newspapers in the city, one of the four commercial television stations in San Francisco, an FM station serving much the same population, and CATV systems with more than 25,000 subscribers.

237. However, it would not be accurate to say that Chronicle dominates the media, or any segment thereof. Numerous other newspapers are published in the Bay Area, and some enjoy very substantial circulations. Indeed, the total circulations of the newspapers with which Chronicle competes far exceed its own. Its television station faces extensive competition. All of its Grade A viewers have at least seven other Grade A signals available, and two-thirds of them receive ten or more such signals. Virtually, all of its potential FM listeners have at least ten other FM signals to choose from, and most have twenty or more. Its CATV systems serve only 13.5% of the CATV subscribers within KRON's Grade B contour.

238. Chronicle's surveys showed the results of this competition. Of its total potential audience only some half actually listened to any of its voices, and only one in ten was exposed exclusively to Chronicle outlets.

239. Nor does Chronicle receive a lion's share of the available advertising revenues. While exact figures are unobtainable, estimates in the record indicate that the newspaper and television station together receive approximately 7–8% of the total monies devoted to advertising in the area.

240. Moreover, the record fails to demonstrate that Chronicle even attempts to speak with a single voice. The various outlets have common management only at the very highest levels. The staffs who actually produce what is presented to the public are entirely separate. There is little indication that the persons responsible for the business destinies of the Chronicle properties interfere with the professional undertakings of their subordinates, much less try to impose a common policy upon them.

241. Thus, there is no indication that the owners of KRON have a greater concentration of media control than exists in numerous other cities. In somewhat similar circumstances, the Commission has recently renewed the television license involved, noting that possible changes in its policy in this area are "more appropriately dealt with in general rule-making proceedings", *Midwest Radio-Television, Inc.*, 19 RR 2d 861.

*Issue No. 2: Anti-Competitive Practices*

242. In the period 1954 to 1964 the San Francisco newspapers faced conditions similar to those faced by major metropolitan dailies throughout the country. Costs rose, but revenues could not keep pace.

Readers and advertisers were lost to television. With the growth of suburbs, it became economically feasible for suburban newspapers to become more sophisticated, and they grew into a serious competitive force. The consequences were harsh for the San Francisco papers. Four of them became three, and all three lost money.

243. In this context Chronicle competed vigorously. It redesigned its format, and found favor with its readers. Hence, although it suffered losses, it was the least unprofitable of the San Francisco newspapers, and was able to cover operating costs. Nevertheless, only the substantial profits from KRON–TV allowed the Chronicle publishing Co. to keep its overall operation in the black.

244. During this period Chronicle expended substantial sums on promotion. However, it would be unwarranted to conclude that its practices were predatory. Although its major circulation gains were in the suburbs rather than the city, its promotional activities were not centered on the suburbs or directed against the suburban newspapers. Its activities were spread evenly throughout the Bay Area which it serves. The more reasonable explanation for the growth of suburban circulation lies in the growth of the suburbs themselves.

245. Indeed, although the Chronicle was far more successful than the Examiner in building circulation, it was the Examiner which expended the greater sums on promotion. Since the promotional campaigns of the two papers were essentially similar, it seems fair to conclude that Chronicle's greater success is primarily attributable to greater appeal to a larger segment of the potential newspaper readers in the area. There is no showing that Chronicle's practices during this period were in any way unusual or unfair, or that the profits from the television station were devoted to financing any improper competitive procedures.

246. Nevertheless, although Chronicle was the victor in its circulation competition with the Examiner, it continued to lose money. Thus, Mr. Thieriot was receptive when Mr. Hearst proposed a joint operating agreement.

247. Whatever arguments might have been made as to the contemporary propriety of that agreement, the Newspaper Preservation Act establishes its present legality. However, that does not end the matter. The Commission's primary concern is not to enforce the antitrust statutes, but to ascertain what effect an applicant's activity relative to such statutes and their underlying principals has on its qualifications to be a licensee, *NBC* v. *U.S.*, 319 US 190.

248. Even under this test Chronicle i s not to be faulted. Mr. Thieriot was acutely conscious of the anti-trust implications of the agreement, and he insisted upon a Business Review Letter from the Department of Justice. That is to say, even after securing advice from experienced counsel that the agreement was legal, he insisted upon the strongest confirmation obtainable from the governmental authority with primary responsibility for enforcing national policy in this area. Such is the conduct of a responsible man sensitive to his obligations, and it does not call into question the qualifications of his corporation to be a Commission licensee.

249. Nor does the functioning of the joint operating agreement warrant adverse conclusions under this issue. Editorial independence

of the two papers has been preserved. Although advertising rates have risen they have not become out of accord with rates charged by metropolitan newspapers around the country. Indeed, while rates are now compensatory, competition from alternative advertising outlets places an effective ceiling on what can be charged.

250. Of course, various interests have been affected adversely by the joint operating agreement. Marginal advertisers have found the increased advertising costs difficult to absorb. Employment opportunities were reduced when production and distribution staffs were consolidated. Nevertheless, the design of the agreement was to insure survival of two newspapers in San Francisco, not to establish a monopoly to create an opportunity for malign practices. Competition among newspapers in the area as a whole has not been stifled, and the suburban newspapers have prospered in terms of circulation and advertising linage. It is concluded that neither the intention nor the result of the joint operating agreement reflects adversely on Chronicle's qualifications to be a licensee of the Commission.

251. Finally, the record explores Chronicle's use of syndicated materials. Chronicle follows an industry wide practice of seeking territorial exclusivity for syndicated material it purchases, and it does so in order to make itself competitively more attractive. However, there is no showing that it abuses its exclusivity or uses it for unfair competitive purposes. Its geographical area of exclusivity corresponds to the area in which it is an actual competitive force. Although it does not print all of the syndicated material it receives, its reasons therefor are related to the useability of the material and not to a desire to keep it from competitors. It has purchased only some 3% of the total syndicated material available, and it has not secured the rights to many features which other metropolitan papers deem worth printing. In sum, Chronicle merely follows an established industry practice, and both its reasons and methods are related to legitimate, not predatory competition. Its syndication practices do not reflect adversely on its qualifications to be a licensee of the Commission.

*Issue No. 3: News Management*

252. In its Specification Order released April 23, 1969, the Commission emphasized that this issue did not contemplate a generalized examination of KRON's programming to see if it was fair. Rather the inquiry was initiated "because of the presence of outside business interests and specific allegations that the preparation of programs has been deliberately made compatible with those interests". That is to say, the judgment, in this instance, is not of the content of programming *per se*. It is of the motives which underlay the presentation of that programming, specifically whether it was governed by self-interest.

253. Such motives can, of course, be inferred from program content. However, if program content is the sole or primary evidence relied upon, the Commission would, *in effect*, be placed in the role of a censor imputing improper motivation for programming of which it disapproves. Since the Examiner is aware that the Commission eschews such a role, he believes that adverse conclusions under this issue are to be reached only if KRON's improper motives have been established by the most clear, convincing and unambiguous evidence.

254. No such evidence has been adduced. To a tiny core of incidents not inconsistent with guilt has been added a welter of rumor, innuendo, suspicion, and office jokes. A brief analysis of some of the incidents relied upon will illustrate the point.

255. Turning first to the CATV matters, the Examiner is asked to conclude that the men who run KRON seriously thought that their chances of getting municipal franchises depended upon whether the station covered a PTA amateur night or the dedication of a new library building with its attendant speeches. Both Mr. See and Mr. Thieriot testified at length and each seemed to be a practical and realistic man. The Examiner is not persuaded that either is likely to have entertained such a notion. Nor is the case regarding the incident at Vallejo any stronger. The record indicates that an over zealous employee resented his superior's refusal to ratify his proposed modification of a program concept. He attributed the decision to self-interest, and so informed his associates.

256. However, it appears the KRON news staff made a joke of it. Thereafter every unpopular assignment was attributed to CATV interest, and this was recited by reporters, cameramen and the professional newsman who supervised them. A few, however, did take it seriously. To Mr. Kihn these cynically facetious remarks were comformation of his suspicions regarding his employer. Faithfully he recorded them in his diary as evidence of KRON's misconduct. The Examiner is unable to accord them the same weight.

257. Nor have the allegations that KRON is improperly solicitous of Chronicle been proven. When the joint operating agreement was implanted KRON was in a unique position. Its connection with Chronicle was known, and any comment it made would be publicly regarded as based on "inside" information. Yet KRON's management actually knew nothing. Under such circumstances, a decision to say nothing was not unreasonable. To infer that the real purpose was to lull the public reaction to the joint operating agreement by keeping knowledge of it from them, one must blink the fact that Thieriot and See knew of the coverage by competing stations. Knowing that, it is implausible that they could have believed that KRON's silence would tend to preserve the secret.

258. Similarly, the record does not support the charge that KRON has favored management's cause in labor disputes involving Chronicle interests or the industry in general. No more is shown than that the station has insisted on balanced coverage of such disputes. In implementing that policy disputes have arisen between reporters or cameramen and their superiors regarding the coverage of specific incidents. Nevertheless, overall coverage has been balanced and free of bias. The record reveals no sinister pattern upon which an adverse conclusion might be based.

259. The other incidents relating to this charge have been discussed in the findings. Plainly, none of them, standing alone, warrants a conclusion that the station has a policy or practice of improperly promoting its own interests. There remains to be considered whether, viewed as a whole, they show a consistent course of action from which such policy or practice can be reasonably inferred. The Examiner does not conclude this to be the case.

260. No pattern emerges. Each incident is shown to have been judged on its own facts and the decisions relating thereto made on the basis of those special facts. In retrospect, not every judgment was perfect, but no judgment is shown to have been made for the purpose of serving any express or implied policy to slant or bury certain news. This is not to say that KRON employees were unaware of the impact their actions might have on their employer's interests. See's memo of October 16, 1967, indicates that such awareness existed. This may very well account for the suspicions which gave rise to Mr. Kihn's diary, and to Mr. White's feeling that he must exercise self-censorship. However it is not shown that this awareness actually affected the coverage of any news story or that it was deliberately fostered by KRON's management. See's memo itself tends to show that when he became cognizant of it he took steps to stop it. While such a climate is undesirable and potentially dangerous, it does not of itself justify a conclusion that KRON did, in fact, slant news to serve its own interest.

261. It is concluded that the licensee did not use the facilities of Stations KRON–FM and KRON–TV to "manage" or slant the news and public affairs for the purpose of advancing the interests of the Chronicle Publishing Company.

*Issue No. 4: Past Programming*

262. KRON's programming is to be considered only insofar as it may be a countervailing factor in the event of adverse conclusions on Issues 2 and 3. Since the conclusions on those issues were favorable to the licensee, it is unnecessary to consider evidence in mitigation.

263. However, the evidence is too extensive to justify passing on without comment. It is shown that KRON has devoted significant amounts of time, money and talent to public service programming. It is not the function of the Commission to pass critical judgments on these presentations. The important fact is that the licensee has made a sincere and substantial effort to serve the needs of its audience. If the conclusions of this Initial Decision were of the sort that might be mitigated by a showing of meritorious past programming, the evidence on this record would be entitled to not insignificant weight to that end.

*Issue No. 5: Investigative Issue*

264. Chronicle's decision to undertake an investigation of the Complainants was inspired by Mr. Kihn's letter to the Commission, and the fact that he appeared to have allied himself with Mrs. Streeter whose quarrel with Chronicle had no obvious relationship to his own. On this evidence alone Chronicle suspected a combination against it for unknown ends. Nevertheless it is not concluded that either the decision to investigate or the conduct of the investigation was unreasonable or malicious, or had the design or effect of chilling citizen complaint to the Commission.

265. When the investigation was first undertaken KRON found itself in an unusual situation. It had just learned that an employee had asserted to the Commission that it had committed serious ethical breaches in its program presentation. Those charges had been associated with a complaint by a former employee of its parent who was then plaintiff in a large anti-trust suit against that parent. It cannot

easily be faulted if it suspected there was some connection for purposes not then apparent.

266. Its counsel, who were not without experience, recommended that an investigation be conducted. Further, they recommended a firm known to them to be able and discreet. It would have been imprudent for KRON's management to reject such advice.

267. The investigation that was commissioned was to be discreet, and, in fact, it was so conducted. While a combination of geographical circumstance and minor inaptitude on the part of individual detectives permitted the fact of the surveillance to become known in Kihn's neighborhood, Kihn himself did not become aware of it. No doubt a surveillance could be conducted in a manner intended to harass and intimidate the subject. However, it is inconceivable that a surveillance with this intention could be conducted of a man as observant as Mr. Kihn for 27 days without his even becoming aware of it. This, coupled with the fact that it was discontinued immediately when he did detect it, precludes any conclusion that the surveillance was intended to harass Mr. Kihn or discourage him from pursuing his objective.

268. Nor do the subsequent features of the investigation reflect adversely on KRON's intentions. KRON endeavored to secure information useful on cross-examination. It sought facts both related and unrelated to the subject of the proceeding.[76] However, it did not let the data it acquired become public, but kept the material in a locked file in Mr. See's own office.

269. In conducting its investigation it relied on the advice of experienced counsel and employed detectives of excellent reputation. Authorities of unquestionable competence on the subject of investigation share the opinion that both the objectives and methods of the investigation were conventional and legitimate. In short, KRON did no more than has been long recognized to be proper for a litigant in an American tribunal. It is concluded that the investigation did not constitute an attempt to harass, coerce or intimidate the Complainants or anyone else.

SUMMARY

270. All of the issues have been resolved in favor of the applicant. The public interest would be served by a grant of the subject applications.

Accordingly, IT IS ORDERED, That unless an appeal is taken to the Commission by a party or the Commission reviews the Initial Decision on its own motion in accordance with Rule 1.276, the applications of Chronicle Broadcasting Co. for renewal of licenses of Stations KRON–TV and KRON–FM, ARE GRANTED.

CHESTER F. NAUMOWICZ, Jr.,
*Hearing Examiner,*
*Federal Communications Commission.*

[76] At the risk of stating the obvious, a cross-examiner may find information unrelated to the matter at hand of legitimate use. A witness who has been impressed with the cross-examiner's knowledge about him tends to frame his answers quite exactly without exaggeration or distortion. Further, if a witness is willing to falsify, the proclivity may best be shown with respect to demonstrable personal facts.